

BIENNIAL REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF NORTH CAROLINA

VOLUME 24
1936-1938

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BIENNIAL REPORT
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ATTORNEY GENERAL
OF THE
STATE OF NORTH CAROLINA

VOLUME 24

1936-1938

HARRY McMULLAN
ATTORNEY GENERAL

T. W. BRUTON
ROBT. H. WETTACH
L. O. GREGORY
ASSISTANT ATTORNEYS GENERAL

LIST OF ATTORNEYS GENERAL SINCE THE ADOPTION OF CONSTITUTION IN 1776

	<i>Term of Office</i>
Avery, Waightsill	1777-1779
Iredell, James	1779-1782
Moore, Alfred	1782-1790
Haywood, J. John	1791-1794
Baker, Blake	1794-1803
Seawell, Henry	1803-1808
Fitts, Oliver	1808-1810
Miller, William	1810-1810
Burton, Hutchins G.	1810-1816
Drew, William	1816-1825
Taylor, James F.	1825-1828
Jones, Robert H.	1828-1828
Saunders, Romulus M.	1828-1834
Daniel, John R. J.	1834-1840
McQueen, Hugh	1840-1842
Whitaker, Spier	1842-1846
Stanly, Edward	1846-1848
Moore, Bartholomew F.	1848-1851
Eaton, William	1851-1852
Ransom, Matt W.	1852-1855
Batchelor, Joseph B.	1855-1856
Bailey, William H.	1856-1856
Jenkins, William A.	1856-1862
Rogers, Sion H.	1862-1868
Coleman, William M.	1868-1869
Olds, Lewis P.	1869-1870
Shipp, William M.	1870-1872
Hargrove, Tazewell L.	1872-1876
Kenan, Thomas S.	1876-1884
Davidson, Theodore F.	1884-1892
Osborne, Frank I.	1892-1896
Walser, Zeb V.	1896-1900
Douglas, Robert D.	1900-1901
Gilmer, Robert D.	1901-1908
Bickett, T. W.	1909-1916
Manning, James S.	1917-1925
Brummitt, Dennis G.	1925-1935
Seawell, A. A. F.	1935-1938
McMullan, Harry	1938-

LETTER OF TRANSMITTAL

1 November, 1938.

*To His Excellency,
CLYDE R. HOEY, Governor,
Raleigh, North Carolina.*


DEAR SIR:

In compliance with statutes relating thereto, I herewith transmit the report of this Department for the biennium 1936-38.

Yours very truly,

HARRY McMULLAN,
Attorney General.

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EXHIBIT I

CIVIL ACTIONS DISPOSED OF OR PENDING IN THE COURTS OF NORTH CAROLINA AND IN OTHER COURTS

PENDING IN SUPERIOR COURTS OF NORTH CAROLINA

American Telephone and Telegraph Co. v. Maxwell, Commissioner of Revenue.

Atlanta and Charlotte A. L. Ry. Co. v. Maxwell, Commissioner of Revenue.

Belk Brothers v. Maxwell, Commissioner of Revenue.

Belk Brothers v. Maxwell, Commissioner of Revenue.

Best & Co., Inc. v. Maxwell, Commissioner of Revenue.

Charlotte Mercantile Co. v. Maxwell, Commissioner of Revenue.

City of Charlotte v. Coddington Co., Inc.

Duke - Gladys B., v. Dr. Hubert Royster, et als.

Grandy - Lillie, et als. v. University of North Carolina.

N. C. Midland R. R. Co. v. Maxwell, Commissioner of Revenue.

N. C. Mortgage Corporation v. Maxwell, Commissioner of Revenue.

N. C. R. R. Co. v. Maxwell, Commissioner of Revenue.

Norden - Eric, v. State Board of Education.

Sherrill v. State Board of Elections.

Southeastern Realty Corporation v. Maxwell, Commissioner of Revenue.

Standard Oil Co. of New Jersey v. Maxwell, Commissioner of Revenue.

State ex rel. Maxwell, Commissioner of Revenue v. H. M. Burden.

State ex rel. Maxwell, Commissioner of Revenue v. H. J. Winfield.

State ex rel. State Hospital v. First Nat'l. Bank, Guardian.

State ex. rel. State Hospital v. Neill Somers, Guardian.

State ex rel. State Hospital v. Adcock.

Sutton Motor Co. v. Maxwell, Commissioner of Revenue.

Swaringen v. J. M. Cooper, et als.

Western Union Telegraph Co. v. Maxwell, Commissioner of Revenue.

Winborne, Utilities Commissioner v. Blackburn.

Winborne, Utilities Commissioner v. Eggers.

Winborne, Utilities Commissioner v. Mobley.

DISPOSED OF IN SUPERIOR COURTS
OF NORTH CAROLINA

Allen - J. C., v. Commissioner of Banks.

Atlantic Joint Stock Land Bank v. Floyd.

Atlas Supply Co., et als., v. Maxwell, Commissioner of Revenue.

Baker - E. E., etc., v. A. R. Bullock, et als.

Barber v. State Hospital.

Bloom - Eli, v. J. H. Rose, et als.

Brothers v. Julia N. Evans, et als. and Commissioner of Revenue.

Burnett v. Thompson.

Calcutt, et als. v. McGeachy et als.

Cameron - A. M., et als. v. Mamie Leslie, et als.

C. T. H. Corporation v. Maxwell, Commissioner of Revenue.

Clark - M. P. v. State Hospital.

Duffy - H. Bryan, v. H. P. Smith, et als.

Ficklen Tobacco Co. v. Maxwell, Commissioner of Revenue.

Graham - D. R., v. State Auditor, et als.

Hall - J. A., v. Maxwell, Commissioner of Revenue.

Harwood, Admr. v. Maxwell, Commissioner of Revenue (Kistler Est.)

Hawkins v. Gregg.

In. re: Glen Greer.

In re: Knighten.

McCanless Motor Co. v. Maxwell, Commissioner of Revenue.

Madison Investment Co. v. Maxwell, Commissioner of Revenue.

Matthews, et als. v. Lawrence.

Maxwell, Commissioner of Revenue v. D. C. Waddell.

Midgett, et als. v. N. C. Fisheries Commission, et als.

O'Berry - Nathan, Trustee v. Allison Corporation, et als.

Park McLain, Inc. v. Attorney General and Commissioner of Revenue.

Patterson, et als. v. State School Commission.

Safe Bus Co. v. Maxwell, Commissioner of Revenue.

Sinclair Refining Co. v. Town of Waynesville.

South Atlantic Investment Co. v. Maxwell, Commissioner of Revenue.

Southeastern Realty Corporation v. Maxwell, Commissioner of Revenue.

State v. Atlantic Ice and Coal Co.

State v. Priddy, et als.

State ex rel. Union County v. Rodman-Heath Cotton Mills.

State ex rel. Attorney General & Board of Exam. in Optometry v. National Optical Stores.

State ex rel. State Hospital v. Lucy M. Anders, Admx.

State ex rel. State Hospital v. First National Bank, Guardian - Sprinkle.

State ex rel. State Hospital v. First National Bank, Guardian - Stanley.

State ex rel. Commissioner of Revenue v. Irma C. Fix, et als.

Strader v. Maxwell, Commissioner of Revenue.

Texas Co., v. Polk County Board of Education.

Textile Workers Organizing Committee v. Mansfield Cotton Mills.

Union National Bank, Admr. Squires Estate v. Maxwell, Com's of Revenue.

Utilities Commissioner v. Hiatt.

Utilities Commissioner v. Deathridge.

Utilities Commissioner v. Jones.

Utilities Commissioner v. Vanpelt and Glory.

Utilities Commissioner v. Clyde Yancey.

Utilities Commissioner v. Wellman.

Utilities Commissioner v. R. B. Moody.

Utilities Commissioner v. D. V. Moody.

Utilities Commissioner v. Turner.

Utilities Commissioner v. Blue Bird Taxi Co.

Utilities Commissioner v. Walker.

Utilities Commissioner v. Brackett.

Utilities Commissioner v. Reynolds.

Utilities Commissioner v. Slaton.

Virginia Electric & Power Co. v. Maxwell, Commissioner of Revenue.

Weaverville - Town of, v. Hobbs, Commissioner, Veterans Loan Fund.

Williams v. Camp Manufacturing Co.

Williams, et als. v. Mrs. Julia Williford, et als.

Windley, et als. v. Lupton, et als.

PENDING IN SUPREME COURT OF NORTH CAROLINA

Sinclair Refining Co. v. Town of Waynesville, et als.
Belk Brothers v. Maxwell, Commissioner of Revenue.
Ficklen Tobacco Co. v. Maxwell, Commissioner of Revenue.

DISPOSED OF IN SUPREME COURT OF NORTH CAROLINA

Atlantic Ice and Coal Co. v. Maxwell, Commissioner of Revenue, 210 N. C. 723.

Atlas Suply Co. v. Maxwell, Commissioner of Revenue, 212 N. C. 624.

Barber v. State Hospital, 213 N.C. 515.

Calcutt, et als. v. McGeachy, et als., 213 N. C. 1.

C. T. H. Corporation v. Maxwell, Commissioner of Revenue, 212 N. C. 803.

Commissioner of Revenue v. Waddell, 212 N. C. 572.

Harwood, Admr. v. Maxwell, Commissioner of Revenue, 213 N. C. 55.

McCanless Motor Co. v. Maxwell, Commissioner of Revenue, 210 N. C. 725.

Matthews, et als. v. Lawrence, 212 N. C. 537.

Safe Bus Co. v. Maxwell, Commissioner of Revenue, 214 N. C. 12.

Weaverville - Town of, v. Hobbs, Commissioner, 212 N. C. 684.

PENDING BEFORE INDUSTRIAL COMMISSION

J. M. Chadwick, Admr. v. Department of Conservation and Development.

DISPOSED OF BEFORE INDUSTRIAL COMMISSION

Barber v. State Hospital.

Bradsher - W. H., Admr. v. E. C. T. College.

Bryant - Fred, v. Women's College, U. N. C.

Dew - Henry, v. State School Commission.

Fullbright - Hardy, v. State School Commission.

Johnson - Mrs. Edna, v. State Commission for Blind.

Safrit v. Dept. of Conservation and Development.

Sawyer v. State School Commission.

Scott, Blue and Rogers v. State School Commission.

Shope v. Dept. of Conservation and Development.

Swinson - McDonald, v. State School Commission.

Weatherspoon v. Dept. of Conservation and Development.

Whitaker v. Dept. of Conservation and Development.

DISPOSED OF IN GENERAL COUNTY COURT

Rhodes v. Hood, Commissioner of Banks.

DISPOSED OF IN PROBATE COURT OF MASSACHUSETTS

In re: Elva Statler Davidson Estate.

DISPOSED OF BEFORE THE GOVERNOR OF MASSACHUSETTS

In re: Extradition of Fred E. Beal.

PENDING IN UNITED STATES DISTRICT COURT

American Telephone and Telegraph Co. v. Maxwell, Commissioner of Revenue.

U. S. of America v. Southern States Power Co. et als.

DISPOSED OF IN UNITED STATES DISTRICT COURT

Barrett - L. C., et als. v. Maxwell, Commissioner of Revenue.

Lucas v. City of Charlotte, et als.

Morris v. Madrin, et als.

N. C. Mortgage Corp. v. Maxwell, Commissioner of Revenue.

Shell Eastern Petroleum Products, Inc. v. Maxwell, Commissioner of Revenue.

Standard Oil Co. of New Jersey v. Maxwell, Commissioner of Revenue.

Turcke - A. G., v. Hoey, Governor, et als.

Womble, et als. v. Maxwell, Commissioner of Revenue.

DISPOSED OF IN CIRCUIT COURT OF APPEALS

Carolina Aluminum Co. v. Federal Power Commission

Shell Eastern Petroleum Products, Inc. v. Maxwell, Commissioner of Revenue.

DISPOSED OF IN UNITED STATES SUPREME COURT

Lively - Mary B., et als. v. Y. W. C. A. of Pittsburgh (amicus curiae) 299 U. S. 572 and 621.

Shell Eastern Petroleum Products, Inc. v. Maxwell, Commissioner of Revenue, 302 U. S. 715, 82 L. ed., 24, 58 S. Ct. 34.

Walls, - Tommie, v. State of North Carolina, 82 L. ed. 58 S. Ct. 18.

EXHIBIT II

LIST OF CRIMINAL CASES ARGUED BY THE ATTORNEY GENERAL AND HIS ASSISTANTS BEFORE THE SUPREME COURT: FALL TERM, 1936; SPRING TERM, 1937; FALL TERM, 1937; SPRING TERM, 1938.

FALL TERM, 1936

State v. Atkinson, from Pitt; violating liquor laws; defendant appealed; no error. 210 N. C. 661.

State v. Batts, from Lenoir; conspiracy with intent to defraud; defendant appealed; no error. 210 N. C. 659.

State v. Bean, from Moore; manslaughter; defendant appealed; new trial; 211 N. C., 59.

State v. Coffey, from Avery; murder first degree; defendant appealed; no error. 210 N. C., 561.

State v. Creech, from Sampson; manslaughter; defendant appealed; reversed. 210 N. C. 700.

State v. Early, from Yadkin; rape; defendant appealed; no error; 211 N. C. 189.

State v. Edmundson, from Wayne; murder second degree; defendant appealed; no error. 210 N. C. 639.

State v. Forbes, from Avery; seduction; defendant appealed; reversed. 210 N. C. 567.

State v. Godwin, from Tyrrell; larceny; defendant appealed; affirmed. 210 N. C. 447.

State v. Grier, from Mecklenburg; murder first degree; defendant appealed; no error. 210 N. C. 720.

State v. Herndon, from Durham; conspiracy to rob; defendant appealed; no error. 211 N. C. 123.

State v. Hiatt, from Davidson; non-support; defendant appealed; dismissed. 211 N. C. 116.

State v. Ivey, from Henderson; larceny; defendant appealed; no error. Per curiam. 210 N. C. 834.

State v. Jackson, from Forsyth; Rape; defendant appealed; no error. 211 N. C. 202.

State v. Lancaster, from Wayne; violating liquor laws - M. V. law - A. D. W.; defendant appealed; no error; per curiam. 210 N. C. 584.

State v. McAllister, from Wake; larceny; defendant appealed; no error; per curiam. 210 N. C. 778.

State v. Macklin, from Halifax; murder first degree; defendant appealed; no error. 210 N. C. 496.

State v. Moore, from Buncombe; murder first degree; defendant appealed; affirmed. 210 N. C. (459) 686.

State v. Nall, from Moore; murder first degree; defendant appealed; new trial. 211 N. C. 61.

State v. Perry, from Hertford; murder first degree; defendant appealed; new trial. 210 N. C. 796.

State v. Puckett, from Richmond; murder first degree; defendant appealed; new trial. 211 N. C. 66.

State v. Puett, from Burke; manslaughter; defendant appealed; no error. 210 N. C. 633.

State v. Rhodes, from Martin; violating liquor laws; defendant appealed; no error; per curiam. 210 N. C. 473.

State v. Riggsbee, from Granville; violating liquor laws; defendant appealed; no error. 211 N. C. 128.

State v. Smith, from Columbus; burglary first degree; defendant appealed; no error. 211 N. C. 93.

State v. Smith, from Guilford; violating municipal ordinance; defendant appealed; action dismissed. 211 N. C. 206.

State v. Spaulding, from New Hanover; receiving stolen goods; defendant appealed; new trial. 211 N. C. 63.

State v. Stancill, from Richmond; violating liquor laws; defendant appealed; no error; per curiam. 210 N. C. 843.

State v. Tate, from Pitt; murder first degree; defendant appealed; no error. 210 N. C. 613.

State v. Triplett, from Wilkes; murder first degree; defendant appealed; no error. 211 N. C. 105.

State v. Warren, from Guilford; violating real estate act; defendant appealed; reversed. 211 N. C. 75.

State v. Wells, from Gaston; seduction; defendant appealed; reversed. 210 N. C. 738.

State v. Winckler, et al. from Warren; felonious breaking and entering; defendants appealed; new trial. 210 N. C. 556.

State v. Witherspoon, from Caldwell; rape; defendant appealed; new trial. 210 N. C. 647.

State v. Young, from Buncombe; forgery; defendant appealed; new trial; 210 N. C. 452.

DOCKETED AND DISMISSED ON MOTION

State v. Laurence, from Iredell.
State v. Smathers, from Jackson.
State v. Rymer, from Buncombe.
State v. Spivey, from Wake.
State v. Parker, from New Hanover.
State v. Weeks, from Guilford.
State v. Rigsbee, from Durham.
State v. Payne, from Alamance.

SPRING TERM, 1937

State v. Boykin, from Pitt; reckless driving; defendant appealed; no error. 211 N. C. 407.

State v. Bridgers, from Nash; violating municipal ordinance; defendant appealed; no error. 211 N. C. 235.

State v. Brooks, from Nash; abandonment, etc.; defendant appealed. Error. 211 N. C. 702.

State v. Callett, from Mecklenburg; crime against nature; defendant appealed; reversed. 211 N. C. 563.

State v. Edwards, from Gaston; murder first degree; defendant appealed; new trial. 211 N. C. 555.

State v. Evans, from Pitt; abortion; defendant appealed; no error. 211 N. C. 458.

State v. Flowers, from Forsyth; conspiracy to rob - robbery; defendant appealed; no error. 211 N. C. 721.

State v. Folger, from Forsyth; reckless driving; defendant appealed; new trial. 211 N. C. 695.

State v. Godwin, from Harnett; murder second degree; defendant appealed; new trial. 211 N. C. 419.

State v. Holland, et al., from Jackson; murder second degree; defendant Moses appealed; appeal dismissed. 211 N. C. 284.

State v. House, from Pitt; violating liquor laws; defendant appealed; no error. 211 N. C. 470.

State v. Jones, from Jones; violating liquor laws; defendant appealed; no error. 211 N. C. 735.

State v. Lee, from Harnett; burning not arson; defendant appealed; new trial. 211 N. C. 326.

State v. McDonald, from Granville; manslaughter; defendant appealed; reversed. 211 N. C. 672.

State v. McNeill, from Harnett; murder first degree; defendant appealed; remanded for change in sentence. 211 N. C. 286.

State v. May, from Guilford; crime against nature; defendant appealed; no error; per curiam. 211 N. C. 740.

State v. Moore, et al., from Alamance; larceny; defendant appealed; no error. 211 N. C. 748.

State v. Ormand, from Pitt; manslaughter; defendant appealed; no error. 211 N. C. 437.

State v. Stiwinter, et al., from Macon; F. & A.; defendants appealed; new trial. 211 N. C. 278.

State v. Thornton, from Johnston; manslaughter; defendant appealed; new trial. 211 N. C. 413.

State v. Walls, from Mecklenburg; burglary first degree; defendant appealed; no error. 211 N. C. 487.

State v. Wharton, from Guilford; robbery - A. D. W. I. Kill; defendant appealed; no error. 211 N. C. 742.

State v. Williams, from Wake; larceny; defendant appealed; no error. 211 N. C. 569.

State v. Woodell, et al., from Robeson; F. & A.; defendants appealed; reversed; per curiam. 211 N. C. 635.

DOCKETED AND DISMISSED ON MOTION

State v. Coggin, from Nash.

State v. Miller, from Montgomery.

State v. Steel and Jones, from Mecklenburg.

State v. Winchester, from Guilford.

State v. Murphy, from Alamance.

FALL TERM, 1937

State v. Baker, from Nash; abortion; defendant appealed; no error. 212 N. C. 233.

State v. Bell, et al., from Beaufort; murder first degree; defendants appealed; no error. 212 N. C. 20.

State v. Brewington, from Wayne; seduction; defendant appealed; reversed. 212 N. C. 244.

State v. Caldwell, from Iredell; rape; defendant appealed; no error. 212 N. C. 484.

State v. Casey, from Craven; murder second degree; defendant appealed; no error. 212 N. C. 352.

State v. Conner, from Gaston; larceny and receiving; defendant appealed; no error. 212 N. C. 668.

State v. Delk, from Guilford; larceny and receiving; defendant appealed; reversed. 212 N. C. 631.

State v. Elmore, from Mecklenburg; A. D. W.; defendant appealed; no error. 212 N. C. 531.

State v. Exum, from Wayne; murder first degree; defendant appealed; no error. 213 N. C. 16.

State v. Farmer, from Buncombe; violating liquor laws; defendant appealed; no error; per curiam. 212 N. C. 831.

State v. Hanford, from Alamance; violating liquor laws; defendant appealed; reversed. 212 N. C. 746.

State v. Johnson, from Guilford; non-support; defendant appealed; no error. 212 N. C. 566.

State v. Linney, et al., from Forsyth; murder first degree; defendants appealed; no error. 212 N. C. 739.

State v. Madden, from Surry; burglary first degree; defendant appealed; new trial. 212 N. C. 56.

State v. Miller, from Rowan; larceny and receiving; defendant appealed; new trial. 212 N. C. 361.

State v. Mosley, from Forsyth; murder first degree; defendant appealed; new trial. 213 N. C. 304.

State v. Murph, et al., from Mecklenburg; robbery, etc.; defendant Bumgarner appealed; no error. 212 N. C. 494.

State v. Palmer, et al., from Cherokee; simple assault; defendants appealed; no error in trial; error in judgment; remanded for judgment. 212 N. C. 10.

State v. Patterson, from Richmond; manslaughter; defendant appealed; new trial. 212 N. C. 659.

State v. Perry, from Chatham; murder first degree; defendant appealed; no error. 212 N. C. 533.

State v. Peterson, from Yancey; murder second degree; defendant appealed; no error. 212 N. C. 758.

State v. Ray, et al., from Yancey; murder second degree; defendants appealed; no error. 212 N. C. 725.

State v. Ray, from Orange; forcible trespass; defendant appealed; affirmed. 212 N. C. 748.

State v. Reynolds, from Surry; manslaughter; defendant appealed; no error. 212 N. C. 37.

State v. Sentelle, from Montgomery; violating liquor laws; defendant appealed; no error; per curiam. 212 N. C. 386.

State v. Smoak, from New Hanover; murder first degree; defendant appealed; no error. 213 N. C. 79.

State v. Spivey, from Durham; crime against nature; defendant appealed; no error. 213 N. C. 45.

State v. Stevenson, from Columbus; burglary first degree; defendant appealed; new trial. 212 N. C. 648.

State v. Terrell, from Warren; murder second degree; defendant appealed; new trial. 213 N. C. 145.

State v. Whitehurst, from Craven; embezzlement; special verdict; appeal by State; affirmed. 212 N. C. 300.

DOCKETED AND DISMISSED ON MOTION

State v. Robinson, from Mecklenburg.

State v. Sermons, from Forsyth.

State v. Hicks, from Alamance.

SPRING TERM, 1938

State v. Adams, from Graham; obstructing cartway; defendant appealed; no error. 213 N. C. 243.

State v. Altson, from Durham; murder first degree; defendant appealed; new trial. 214 N. C. 93.

State v. Baker, from Edgecombe; larceny; defendant appealed; new trial. 213 N. C. 524.

State v. Bradshaw, from Alamance; non-support; special verdict; appeal by State; no error. 214 N. C. 5.

State v. Brice, from Alamance; murder first degree; defendant appealed; judgment affirmed and appeal dismissed. 214 N. C. 34.

State v. Bryant, from Forsyth; manslaughter; defendant appealed; new trial. 213 N. C. 752.

State v. Burnette, from Rockingham; A. D. W. I. Kill; defendant appealed; new trial. 213 N. C. 153.

State v. Carver, from Graham; A. D. W.; defendant appealed; new trial. 213 N. C. 150.

State v. Cradle, from Washington; violating liquor laws; defendant appealed; no error. 213 N. C. 217.

State v. Epps, from Scotland; violating liquor laws; defendant appealed; no error. 213 N. C. 709.

State v. Feyd, from Guilford; burglary second degree; defendant appealed; new trial. 213 N. C. 617.

State v. Fowler, from Wake; rape; defendant appealed; judgment affirmed and appeal dismissed; per curiam. 213 N. C. 549.

State v. Freeman, from Sampson; forgery, etc.; defendant appealed; new trial. 213 N. C. 378.

State v. Fuer, et als., from Lenoir; conspiracy to rob, etc.; defendants appealed; no error; per curiam. 213 N. C. 426.

State v. Hadley, from Sampson; rape; defendant appealed; judgment affirmed and appeal dismissed; per curiam. 213 N. C. 427.

State v. Harris, from Guilford; violating liquor laws; defendant appealed; no error. 213 N. C. 648.

State v. Harris, from Durham; violating C. S. 3537 and 3539 (a); defendant appealed; reversed. 213 N. C. 758.

State v. Hart, from Guilford; disposing mortgaged property; defendant appealed; no error; per curiam. 213 N. C. - - - .

State v. Harvey, from Forsyth; rape; defendant appealed; no error. 214 N. C. 9.

State v. Howie, from Forsyth; rape; defendant appealed; no error. 213 N. C. 782.

State v. Johnson, from Iredell; rape; defendant appealed; no error. 213 N. C. 389.

State v. Jones, from Guilford; operating lottery; defendant appealed; no error. 213 N. C. 640.

State v. Lawrence, from Forsyth; violating photography act; special verdict; appeal by State; reversed. 213 N. C. 674.

State v. Lee, from Harnett; burning not arson; defendant appealed; no error; per curiam. 213 N. C. 319.

State v. Lewis, from Guilford; manslaughter; defendant appealed; no error. 213 N. C. 646.

State v. Libby, from Guilford; violating liquor laws; defendant appealed; no error. 213 N. C. 662.

State v. Linney, from Forsyth; murder first degree; defendant appealed; judgment affirmed and appeal dismissed; per curiam. 214 N. C. 35.

State v. Oliver, from Pamlico; abandonment, etc.; defendant appealed; no error. 213 N. C. 386.

State v. Outlaw, et als., from Duplin; rape; defendants appealed; appeal dismissed; per curiam. 213 N. C. 428.

State v. Payne, et al., from Buncombe; murder first degree; defendants appealed; no error. 213 N. C. 719.

State v. Petree, from Forsyth; murder first degree; defendant appealed; no error. 213 N. C. 785.

State v. Proctor, et als., from Halifax; robbery, etc.; defendant Wells appealed; no error. 213 N. C. 221.

State v. Robinson, et als., from Haywood; manslaughter; defendants appealed; new trial. 213 N. C. 273.

State v. Sanderson, from Duplin; violating liquor laws; defendant appealed; judgment arrested. 213 N. C. 381.

State v. Sims, from Guilford; murder first degree; defendant appealed; no error. 213 N. C. 590.

State v. Smith, from McDowell; rape; defendant appealed; no error. 213 N. C. 299.

State v. Taylor, from Franklin; murder first degree; defendant appealed; no error. 213 N. C. 521.

State v. Trollinger, from Alamance; rape; defendant appealed; no error; per curiam. 214 N. C. 28.

State v. Vick, from Nash; possessing burglar tools; defendant appealed; no error. 213 N. C. 235.

State v. Wilcox, from Robeson; larceny and receiving; defendant appealed; no error; per curiam. 213 N. C. 665.

DOCKETED AND DISMISSED ON MOTION

State v. Baldwin, from Columbus.

State v. King, from Wake.

State v. Livingston, from Henderson.

SUMMARY

Affirmed on defendant's appeal.....	75
Affirmed on State's appeal.....	2
New trial or reversed on defendant's appeal.....	39
Reversed on State's appeal.....	1
Judgment arrested.....	1
Appeal dismissed.....	23
Remanded for change in sentence or for judgment.....	2
Error	1
Total.....	148

CRIMINAL STATISTICS

STATEMENT A

THE FOLLOWING STATEMENT SHOWS THE CRIMINAL CASES DISPOSED OF IN THE SUPERIOR COURTS
DURING THE FALL TERM, 1936, SPRING TERM, 1937.

COUNTIES	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle Pros.	Otherwise Disposed of	Total
Alamance	89	32		115	6	65	15	38	3	121
Alexander										
Alleghany	34			30	4	34				34
Anson	22	25		45	2	39	7	1		47
Ashe	19			19		18	1			19
Avery	88	3		85	6	70	1	20		91
Beaufort	43	52		93	2	63	18	14		95
Bertie	41	23		62	2	50	14			64
Bladen	21	6		26	1	16	7	4		27
Brunswick	46	22		67	1	43	17	8		68
Buncombe	201	97		261	37	275	19	4		298
Burke	28	9		31		31	4	2		37
Cabarrus	170	63	1	224	10	165	25	44		234
Caldwell	55	18		67	6	49	15	9		73
Camden	2	1		2	1	1		2		3
Carteret	13	2		20		20				20
Caswell	16	14		28	2	19	7	4		30
Catawba	114	19		127	6	95	10	27	1	133
Chatham	8	20		25	3	21	3		4	28
Cherokee	101	1		97	5	80	22			102
Chowan	1	1		2		1		1		2
Clay	34	1		35		33	1		1	35
Cleveland	66	71		128	9	107	14	16		137
Columbus	120	60	1	166	15	119	28	34		181
Craven	57	56		110	3	74	10	29		113
Cumberland	34	40		70	4	58	8	8		74
Currituck	6	4		10		10				10
Dare	6	3		9		7	2			9
Davidson	135	26		153	8	137	20	4		161
Davie	108	44		149	3	104	15	31	2	152
Duplin	51	99		142	8	99	16	35		150
Durham	257	281		494	44	376	106	53	3	538
Edgecombe	50	120		148	22	107	32	31		170
*Forsyth	516	417		859	74	778	119	35	1	933
Franklin	18	14		30	2	26	4	2		32
Gaston	340	110		430	20	277	76	97		450
Gates	1	6		6	1	6	1			7
Graham	70			67	3	38		30	2	70
Granville	49	38		83	4	70	9	8		87
Greene	56	40		94	2	73	18	5		96
Guilford	327	226		506	47	453	60	39	1	553
Halifax	37	70		103	4	78	21	6	2	107
Harnett	118	52	2	161	11	110	17	43	2	172
Haywood	179	39		200	18	131	20	67		218
Henderson	75	25		93	7	59	23	18		100
Hertford	14	25		38	1	32	3	4		39
Hoke	19	23		39	3	29	5	8		42
Hyde	6	11		16	1	11	2	3	1	17
Iredell	73	40		110	3	90	10	13		113
Jackson	175	12	15	192	10	165	1	36		202

STATEMENT A—Continued

COUNTIES	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle Pros.	Otherwise Disposed of	Total
Johnston.....	138	58		189	7	172	24			196
Jones.....	20	52		69	3	55	9	8		72
Lee.....	18	33		50	1	37	6	8		51
Lenoir.....	117	79		184	12	143	24	28	1	196
Lincoln.....	30	4		34		28	3	2	1	34
Macon.....	82	1		79	4	38	3	42		83
Madison.....	93	4		88	9	92	4		1	97
Martin.....	34	43		73	4	51	9	16	1	77
McDowell.....	33	2		34	1	35				35
Mecklenburg.....	225	338		518	45	442	116		5	563
Mitchell.....	132			118	14	85	11	36		132
Montgomery.....	51	29		76	4	52	8	20		80
Moore.....	45	56		99	2	71	18	12		101
Nash.....	107	105		198	14	124	21	66	1	212
New Hanover.....	98	117	3	199	19	171	27	19	1	218
Northampton.....	17	29		46		35	3	8		46
Onslow.....	86	35		121		96	12	13		121
Orange.....	133	71		189	15	142	22	40		204
Pamlico.....	4	10		13	1	10	2	2		14
Pasquotank.....	37	22		56	3	41	6	12		59
Pender.....	12	10		22		14	2	5	1	22
Perquimans.....	2	11		11	2	7	1	4	1	13
Person.....	10	14		24		12	10	2		24
Pitt.....	144	133		266	11	168	30	79		277
Polk.....	51	19		68	2	68	2			70
Randolph.....	128	38		162	4	123	10	33		166
Richmond.....	62	44		99	7	74	11	21		106
Robeson.....	135	136	105	349	27	198	48	130		376
Rockingham.....	125	109		225	9	172	30	30	2	234
Rowan.....	64	36		99	1	69	9	21	1	100
Rutherford.....	59	34		92	1	76	5	12		93
Sampson.....	43	65		105	3	100	6	2		108
Scotland.....	9	17	3	26	3	19	9	1		29
Stanly.....	48	10		55	3	53	4	1		58
Stokes.....	144	71		212	3	176	16	23		215
Surry.....	155	16		166	5	137	12	22		171
Swain.....	88	2	4	89	5	53	9	27	5	94
Transylvania.....	78	7		82	3	58	1	26		85
Tyrrell.....	14	15		28	1	20	6	3		29
Union.....	25	18		38	5	25	16	2		43
Vance.....	57	35		88	4	70	19	3		92
Wake.....	219	318		505	32	395	55	87		537
Warren.....	26	22		47	1	30	5	10	3	48
Washington.....	3	7		10		6	4			10
Watauga.....	41	2		43		43				43
Wayne.....	93	106		193	6	124	15	57	3	199
Wilkes.....	257	24		258	23	143	6	132		281
Wilson.....	194	184		346	32	197	39	139	3	378
Yadkin.....	154	24		176	2	135	11	31	1	178
Yancey.....	76	3		78	1	46	8	25		79
Totals.....	8,130	4,979	134	12,468	775	9,543	1,553	2,093	54	13,243

*—1 Corporation.

STATEMENT B

THE FOLLOWING STATEMENT SHOWS THE OFFENSES WITH WHICH DEFENDANTS WERE CHARGED IN THE SUPERIOR COURTS DURING THE FALL TERM, 1936, SPRING TERM, 1937.

COUNTIES	Abandonment	Abduction	Abortion	Atfay	Arson	Assault and Battery	Assault on Female	A. D. W.	Assault with Intent to Kill	Assault with Intent to Rape	Banking Laws—Violation	Bigamy	Breaking and Entering	Bribery
Alamance.....	3				1	1	3	6	2	3			25	
*Alexander.....														
Alleghany.....						1							2	
Anson.....					1	2	1	6	4			2	4	
Ashie.....								2						
Avery.....	1			6				8					3	
Beaufort.....	1					2		8	8	2			13	
Bertie.....						3		3	2				7	
Bladen.....	1				1			1						
Brunswick.....						9	1	5					3	
Buncombe.....	5	1	1		2	6	3	25	3			3	2	1
Burke.....							1	1					11	
Calabus.....	2					3	12	21		4			27	
Caldwell.....						1	3	5	2	2		2		
Camden.....								1						
Carteret.....	1					1		1		1			7	
Caswell.....	2					2		1					3	
Catawba.....	3						1	24				3	21	
Chatham.....					1	2		7					3	
Cherokee.....				4				20					4	

STATEMENT B—Continued

COUNTIES	Abandonment	Abduction	Abortion	Alfray	Arson	Assault and Battery	Assault on Female	A. D. W.	Assault with Intent to Kill	Assault with Intent to Rape	Banking Laws—Violation	Bigamy	Breaking and Entering	Bribery
Johnston.....	4		1			11	4	17						
Jones.....		1				2	1	20						
Lee.....						6							2	
Lenoir.....	4						2	7		1			24	
Lincoln.....							2	1					6	
Macon.....	2			3		1	3	10		2		1	3	
Madison.....	2					3	1	17					1	
Martin.....						1	1	1	1				15	
McDowell.....		2		1				1					3	
Mecklenburg.....	3					12	5	56	27	2		3	34	
Mitchell.....	2		1			1		12		1		1		
Montgomery.....								8		3		2	16	
Moore.....	2					4	2	22	2	1			13	
Nash.....	1					1	6	14	3	1				
New Hanover.....	2		1		1	6	3	7	3	2		1	2	
Northampton.....														
Onslow.....	1						1	15	5				12	
Orange.....		1				1	7	24	1				6	
Pamlico.....						1								
Pasquotank.....						3	1						6	
									1			1		

STATEMENT B—Continued

COUNTIES	Burgery	Burglary— First Degree	Burglary— Second Degree	Burning—Other Than Arson	C. C. W.	Compounding Felony	Concealing Birth of Child	Conspiracy	Cruelty to Animals	Disorderly House	Disposing of Mortgaged Property	Disturbing Meetings	Election Laws— Violation	Embezzlement
Alamance														
*Alexander														
Allegany					2					1		1		
Anson					1					1				
Ashe					2									
Avery														
Beaufort					2									1
Bertie				1										
Bladen									1					1
Brunswick					1									
Buncombe	1		5		3					11	1			2
Burke					1									
Cabarrus			1		4									5
Caldwell														
Camden														
Carteret														
Caswell	1				1					2	1			
Catawba	1													
Chatham			2											
Cherokee					2					1				

[illegible]

STATEMENT B—Continued

COUNTIES	Escape	Failure to List Taxes	False Pretense	Fish and Game Laws—Violation	Food and Drug Laws—Violation	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws— Violation	Housebreaking	Incest	Injury to Property	Larceny and Receiving
Johnston.....			1	1			7	2	10		15		1	43
Jones.....				1										18
Lec.....	1		1				1							25
Lenoir.....			2			6	7		38		3			43
Lincoln.....														7
Macon.....	2					2		5					3	8
Madison.....			1	3		1	1	2			7			13
Martin.....						1	6				2			16
McDowell.....						1	2	2						5
Mecklenburg.....			4			2	7		1		28		4	85
Mitchell.....			2			1		2						25
Montgomery.....	3			2										15
Moore.....									1			1		10
Nash.....			3	1		4	3				37	1	3	55
New Hanover.....			2			3	18	2	7	1	26			54
Northampton.....						1								6
Onslow.....				1		3		1						21
Orange.....			2			4	1		2		3		1	25
Pamlico.....														4
Pasquotank.....						2	6							19

STATEMENT B—Continued

COUNTIES	License, Driving Business Without	License, Practicing Profession Without	Manslaughter	Motor Vehicle Laws—Violation	Municipal Ordinances	Murder—First Degree	Murder—Second Degree	Non-Support	Nuisance	Obstructing Public Highway	Official Misconduct	Perjury	Poisoning	Prohibition Laws—Violation
Alamance.....			5	12			7	1				1		10
*Alexander.....														
Alleghany.....				2										9
Anson.....			3	2			2							4
Ashle.....			1	2				1						4
Avery.....		1	1	5		1								40
Beaufort.....			1	3		2	7							15
Bertie.....			5	4			2							4
Bladen.....				3			1							7
Brunswick.....			1	15	2		2	1	4					6
Buncombe.....		1	8	2			14							49
Burke.....			3	1			1							4
Cabarrus.....	1		7	14			3	4				1		61
Caldwell.....				4										13
Camden.....														
Carteret.....														1
Caswell.....				1				1						5
Catawba.....	1		5	7			1	4				1		17
Chatham.....							1							1
Cherokee.....				13			2	1						34

STATEMENT B—Continued

COUNTIES	License, Doing Business Without	License, Practicing Profession Without	Manslaughter	Motor Vehicle Laws—Violation	Municipal Ordinances	Murder— First Degree	Murder— Second Degree	Non-Support	Nuisance	Obstructing Public Highway	Official Misconduct	Perjury	Poisoning	Prohibition Laws— Violation
Johnston.....			4	13										39
Jones.....							1	3						16
Lee.....				3			7							2
Lenoir.....	1	1	1	6	1		3							21
Lincoln.....	1		2	2										9
Macon.....				10			2							13
Madison.....			4				2	2						29
Martin.....			5	3		2	3							7
McDowell.....			1	2				2						6
Mecklenburg.....			6	13	1	3	19	2				2		106
Mitchell.....			1	5			2	2		2				49
Montgomery.....			3	1			2	1						14
Moore.....		1	2	8			6							9
Nash.....	1		4	13	2	1	3							22
New Hanover.....			6	3			6	3	2					20
Northampton.....				1			3							5
Onslow.....				2		1	1	2	4	4				43
Orange.....			2	15			2	3				1		68
Pamlico.....														1
Pasquotank.....			1	2				2						9

STATEMENT B—Continued

COUNTIES	Prostitution	Rape	Removing Crop	Resisting Officer	Robbery	School Laws— Violation	Seduction	Slander	Storebreaking	Trespass	Vagrancy	Worthless Checks	Miscellaneous	Totals as to Counties
Alamance.....					8	1					1		3	121
*Alexander.....														
Allegany.....	1			1									1	34
Anson.....			1	1									2	47
Ashe.....														19
Avery.....	1			7										91
Beaufort.....							2					1	7	95
Bertie.....									1	1			3	64
Bladen.....												1	3	27
Brunswick.....										5			3	68
Buncombe.....					19	1	1	1		4			6	298
Burke.....													2	37
Cabarrus.....				1	5	1				3			4	234
Caldwell.....				1	1					2			2	73
Camden.....					1				1					3
Carteret.....	1									1			1	20
Caswell.....			1		1									30
Catawba.....					1							1	5	133
Chatham.....														28
Cherokee.....								1					1	102

STATEMENT B—Continued

COUNTIES	Prostitution	Rape	Removing Crop	Resisting Officer	Robbery	School Law Violation	Seduction	Slander	Storebreaking	Trespass	Vagrancy	Worthless Checks	Miscellaneous	Totals as to Counties
Johnston.....			3	4			2					1	7	196
Jones.....					2							1		72
Lee.....													2	51
Lenoir.....		1			1		1		1	2		5	9	196
Lincoln.....							1							34
Macon.....							2	1					1	83
Madison.....													5	97
Martin.....	1			1	1				3	4			2	77
McDowell.....														35
Mecklenburg.....	1	1		3	41		1		57	1		1	18	563
Mitchell.....	5			1									6	132
Montgomery.....		1			1		1					1	3	80
Moore.....							1			3		2	5	101
Nash.....	1	2	1	3	8					1		7	6	212
New Hanover.....					8				13		1	1	6	218
Northampton.....				4			1						4	46
Onslow.....			3									5	5	121
Orange.....		1		1	5				17	3			5	204
Pamlico.....														14
Pasquotank.....			1		2				6				2	59

STATEMENT A-1

THE FOLLOWING STATEMENT SHOWS CRIMINAL CASES DISPOSED OF IN COURTS BELOW THE SUPERIOR COURTS,
REPORTING TO THIS DEPARTMENT DURING THE FALL TERM, 1936, SPRING TERM, 1937.

COUNTIES	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle Pros.	Otherwise Disposed of	Total
Bertie.....	50	89	1	133	7	122	13	5	-----	140
Brunswick.....	166	101	-----	245	22	187	62	18	-----	267
Buncombe.....	568	113	-----	628	53	622	52	7	-----	681
Caldwell.....	500	77	-----	544	33	392	133	51	1	577
Caswell.....	119	140	-----	254	5	201	48	10	-----	259
Chatham.....	148	247	-----	377	18	321	74	-----	-----	395
Chowan.....	29	34	-----	62	1	47	16	-----	-----	63
Columbus.....	648	347	39	969	65	648	266	120	-----	1,034
Craven.....	180	198	-----	349	29	313	57	8	-----	378
Cumberland.....	737	634	7	1,235	143	970	312	95	1	1,378
Davidson.....	1,024	309	-----	1,236	97	1,125	186	22	-----	1,333
Duplin.....	197	225	-----	404	18	304	44	73	1	422
Franklin.....	83	108	-----	178	13	139	52	-----	-----	191
Gaston.....	1,350	462	-----	1,667	145	1,569	141	102	-----	1,812
Granville.....	169	185	-----	338	16	297	46	11	-----	354
Gates.....	24	32	-----	53	3	46	4	6	-----	56
Halifax.....	342	525	1	826	42	648	128	92	-----	868
Harnett.....	710	613	13	1,224	112	1,115	165	54	2	1,336
Haywood.....	512	39	-----	519	32	546	5	-----	-----	551
Henderson.....	267	68	-----	294	41	184	95	56	-----	335
Hertford.....	87	175	-----	249	13	210	45	6	1	262
Iredell.....	290	154	-----	410	34	401	11	28	4	444
Lee.....	160	158	-----	307	11	288	24	4	2	318
Lincoln.....	209	39	-----	220	28	179	45	24	-----	248
McDowell.....	349	19	-----	360	8	364	4	-----	-----	368
*Mecklenburg.....	4,813	2,451	-----	6,500	764	6,290	679	285	10	7,264
Moore.....	263	309	-----	543	29	480	67	24	1	572
Nash.....	290	241	-----	507	24	341	120	70	-----	531
Northampton.....	112	187	-----	294	5	231	58	10	-----	299
Orange.....	215	273	-----	443	45	408	40	40	-----	488
Pamlico.....	85	77	-----	156	6	117	35	8	2	162
Person.....	174	173	1	339	9	299	41	8	-----	348
Pitt.....	190	317	-----	470	37	420	61	18	8	507
Richmond.....	211	153	-----	340	24	286	38	40	-----	364
Rockingham.....	492	385	-----	790	87	747	105	22	3	877
Surry.....	719	108	-----	775	52	774	43	10	-----	827
Tyrrell.....	22	30	-----	49	3	37	13	2	-----	52
Union.....	594	339	-----	880	53	789	69	74	1	933
Vance.....	549	303	-----	773	79	635	154	62	1	852
Wake.....	410	370	-----	741	39	638	109	33	-----	780
Washington.....	97	151	-----	234	14	176	67	5	-----	248
Wilson.....	1,350	1,688	1	2,687	382	2,221	447	394	7	3,069
Totals.....	19,534	12,646	63	29,602	2,641	26,127	4,174	1,897	45	32,243

*—1 Corporation.

STATEMENT B-1—Continued

[illegible]

Chowan.....				1	8			8	1			2					
Clay.....																	
Cleveland.....																	
Columbus.....	4	2		9	70	1		211				9	4	3			
Craven.....	9	1			54			71				1	2				
Cumberland.....	18			4	134			363	15			10	5	2		1	
Currituck.....																	
Dare.....																	
Davidson.....	31			10	31	7		1	238	69		10	5				
Davie.....																	
Duplin.....				1	5	46				42		4	5	1		1	
Durham.....																	
Edgecombe.....																	
Forsyth.....																	
Franklin.....					13			21									
Gaston.....	65			8	107			191	53			6					
Gates.....					2				25								
Graham.....																	
Granville.....				6	13	1		147				12	1		2		
Greene.....																	
Guilford.....																	
Halifax.....	11		1	7	80			162									
Harnett.....	11	2	9	2	85			170	4		1	4	2				
Haywood.....	5							10	1			10					
Henderson.....				6	48	1	1	38	1			4	3				
Hertford.....																	
Hoke.....				1	25	2		81				1					
Hyde.....																	
Iredell.....	6			7	32	4											
Jackson.....								86				8	1				

STATEMENT C

THE FOLLOWING STATEMENT SHOWS THE CRIMINAL CASES DISPOSED OF IN THE SUPERIOR COURTS
DURING THE FALL TERM, 1937, SPRING TERM, 1938.

COUNTIES	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle Pros.	Otherwise Disposed of	Total
Alamance.....	146	39		180	5	97	30	57	1	185
Alexander.....	41	2		43		36	7			43
Alleghany.....	38	7		44	1	45				45
Anson.....	24	16		39	1	28	10	2		40
Ashe.....	62	2		61	3	57	5	2		64
Avery.....	66	2		59	9	42	8	17	1	68
Beaufort.....	40	46		84	2	66	8	10	2	86
Bertie.....	9	26		34	1	26	9			35
*Bladen.....	6	13		19		16	3			19
Brunswick.....	27	13		37	3	23	10	7		40
Buncombe.....	241	136		350	27	319	18	39	1	377
Burke.....	50	12		57	5	39	10	11	2	62
Cabarrus.....	157	80		229	8	171	24	41	1	237
Caldwell.....	93	28		115	6	82	19	20		121
Camden.....	5	2		7		3	2	2		7
Carteret.....	13	14		25	2	27				27
Caswell.....	95	111		202	4	188	15	3		206
Catawba.....	81	37		117	1	91	12	15		118
Chatham.....	14	20		32	2	26	6		2	34
Cherokee.....	116	11	1	117	11	92	36			128
Chowan.....	12	23		33	2	28	5	2		35
Clay.....	21	2		23		20	3			23
Cleveland.....	106	41		137	10	105	23	19		147
Columbus.....	94	110		191	13	148	22	34		204
Craven.....	66	66		127	5	83	15	34		132
Cumberland.....	254	164	2	330	90	235	32	152	1	420
Currituck.....	4	5		9		3	5	1		9
*Dare.....	2			2		1	1			2
Davidson.....	136	26		155	7	135	20	7		162
Davie.....	49	22		68	3	49		22		71
Duplin.....	29	61		86	4	59	13	17	1	90
Durham.....	159	209		327	41	256	55	57		368
Edgecombe.....	43	77		115	5	81	18	20	1	120
Forsyth.....	480	451		852	79	843	83	4	1	931
Franklin.....	18	30		47	1	38	7	3		48
Gaston.....	299	127		407	19	293	73	60		426
**Gates.....										
Graham.....	48			41	7	23	3	22		48
Granville.....	57	50		96	11	70	23	14		107
Greene.....	41	44		80	5	60	15	10		85
Guilford.....	356	240		562	34	488	60	46	2	596
Halifax.....	78	85		155	8	134	14	15		163
Harnett.....	80	63	6	141	8	114	19	16		149
Haywood.....	155	11		157	9	75	17	74		166
Henderson.....	105	35		128	12	94	7	39		140
Hertford.....	20	26		44	2	36	2	8		46
Hoke.....	15	31		44	2	27	3	16		46
Hyde.....	6	7		12	1	6	7			13
Iredell.....	46	42		85	3	88				88
Jackson.....	133	11	2	138	8	98	3	44	1	146

STATEMENT C—Continued

COUNTIES	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle Pros.	Otherwise Disposed of	Total
Johnston.....	149	72	-----	215	6	197	22	2	-----	221
Jones.....	22	36	-----	58	-----	51	2	5	-----	58
Lee.....	29	31	-----	59	1	45	14	1	-----	60
Lenoir.....	98	65	-----	151	12	81	31	45	-----	163
Lincoln.....	33	4	-----	36	1	28	5	4	-----	37
Macon.....	54	1	1	53	3	40	2	14	-----	56
Madison.....	60	3	-----	60	3	48	9	-----	6	63
Martin.....	21	33	-----	49	5	35	9	10	-----	54
McDowell.....	87	7	-----	90	4	94	-----	-----	-----	94
Mecklenburg.....	217	245	-----	426	36	362	97	-----	3	462
Mitchell.....	116	-----	-----	105	11	77	5	34	-----	116
Montgomery.....	49	37	-----	82	4	57	9	20	-----	86
Moore.....	37	29	-----	62	4	36	15	15	-----	66
Nash.....	80	151	-----	220	11	122	30	79	-----	231
New Hanover.....	117	143	-----	245	15	196	35	29	-----	260
Northampton.....	15	15	-----	29	1	21	3	6	-----	30
Onslow.....	71	47	-----	114	4	89	13	14	2	118
Orange.....	113	59	-----	165	7	121	9	40	2	172
Pamlico.....	4	7	-----	7	4	4	5	2	-----	11
Pasquotank.....	16	37	-----	50	3	26	11	15	1	53
Pender.....	19	24	-----	42	1	28	12	3	-----	43
Perquimans.....	9	4	-----	12	1	8	3	2	-----	13
Person.....	7	16	-----	23	-----	13	7	3	-----	23
Pitt.....	104	168	-----	251	21	209	14	49	-----	272
Polk.....	63	21	-----	78	6	53	4	27	-----	84
Randolph.....	96	32	-----	125	3	90	6	32	-----	128
Richmond.....	72	32	-----	96	8	70	17	17	-----	104
Robeson.....	140	140	141	396	25	235	43	141	2	421
Rockingham.....	198	116	-----	284	30	237	28	47	2	314
Rowan.....	64	37	-----	99	2	77	10	12	2	101
Rutherford.....	82	19	-----	97	4	73	13	14	1	101
Sampson.....	50	37	1	85	3	73	13	2	-----	88
Scotland.....	23	32	4	55	4	47	11	1	-----	59
Stanly.....	17	30	-----	43	4	40	4	3	-----	47
Stokes.....	171	52	-----	218	5	184	19	19	1	223
Surry.....	157	23	-----	173	7	148	10	22	-----	180
Swain.....	113	9	4	114	12	72	7	47	-----	126
Transylvania.....	103	9	-----	107	5	82	12	18	-----	112
Tyrrell.....	10	8	-----	18	-----	8	10	-----	-----	18
Union.....	40	26	-----	65	1	47	14	4	1	66
Vance.....	68	59	-----	117	10	98	18	11	-----	127
Wake.....	216	278	-----	469	25	388	28	77	1	494
Warren.....	47	24	-----	71	-----	31	22	18	-----	71
Washington.....	25	29	-----	51	3	37	17	-----	-----	54
Watauga.....	94	4	-----	92	6	85	9	4	-----	98
Wayne.....	74	105	-----	162	17	127	19	32	1	179
Wilkes.....	240	31	-----	236	35	123	25	121	2	271
Wilson.....	168	174	-----	313	29	163	49	128	2	342
Yadkin.....	167	20	-----	182	5	120	14	53	-----	187
Yancey.....	58	5	-----	60	3	32	3	27	1	63
Totals.....	8,319	5,262	162	12,853	890	9,898	1,567	2,231	47	13,743

*Incomplete Reports

**No Reports.

STATEMENT D

THE FOLLOWING STATEMENT SHOWS THE OFFENSES WITH WHICH DEFENDANTS WERE CHARGED IN THE SUPERIOR COURTS OF THE STATE DURING THE FALL TERM, 1937, AND SPRING TERM, 1938.

COUNTIES	Abandonment	Abduction	Abortion	Affray	Arson	Assault and Battery	Assault on Female	A. D. W.	Assault with Intent to Kill	Assault with Intent to Rape	Banking Laws—Violation	Bigamy	Breaking and Entering	Bribery	Burgery	Burglary—First Degree	Burglary—Second Degree	Burning—Other Than Arson
Alamance.....	4					5	3	7	2	7		2	31		3		1	
Alexander.....	1			1			1		1				3					
Alleghany.....	1					7												
Anson.....										1			12		1			
Ashe.....						1	1	14	4									
Avery.....							2	8										
Beaufort.....	1				4	6		4					16				4	
Bertie.....								2	3				7					
Bladen.....						3	1	1		2								
Brunswick.....				2		2		2	5				8					
Buncombe.....	11				4	4	3	37	2	2		1	19		1		3	
Burke.....			1			1	1	1	2			1	22		1			
Cabarrus.....	2					1	11	34	2	2		1	31		2			
Caldwell.....						1		13		3		1	8					
Camden.....																		
Carteret.....																		
Caswell.....	2	1				8	1	25	1	1			4					
Catawba.....						2	5	17		3								
Chatham.....	1						3	1					3					
Cherokee.....	2			13		7	1	11					2					

STATEMENT D—Continued

COUNTIES	Gambling or Lottery	Health Laws— Violation	Housebreaking	Incest	Injury to Property	Larceny and Receiving	License, Doing Business Without	License, Practicing Profession Without	Manslaughter	Motor Vehicle Laws—Violation	Municipal Ordinances	Murder—1st Degree	Murder—2nd Degree	Non-support	Nuisance	Obstructing Public Highway	Official Misconduct	Perjury
Alamance.....	21				4	18			2	10		1	3	4	1			1
Alexander.....						6				2								
Allegany.....						11				1		1		1	1			
Anson.....						8			2	2			1	1				
Ashe.....			2		1	13			2	1	1		1	1				
Avery.....						5				4				6	2			
Beaufort.....					24				4	1		4	1					
Bertie.....			1			5			4	2		1						
†Bladen.....						6			2	2								
Brunswick.....						6				2			2					1
Buncombe.....			58		1	86			4	4			16	1				4
Burke.....						9			3				5	2				
Cabarrus.....	2				1	29			7	18	1		2	10				
Caldwell.....					1	36			1	5			2	6				4
Camden.....													3					
Carteret.....					1	1							3					
Caswell.....						15				11	1		2					
Catawba.....					23				3	5			3	2				
Chatham.....			4			8			1				3					
Cherokee.....					3	21			5	7				2				

STATEMENT D—Continued

COUNTIES	Gambling or Lottery	Health Laws— Violation	Housebreaking	Incest	Injury to Property	Larceny and Receiving	License Doing Business Without	License, Practicing Profession Without	Manslaughter	Motor Vehicle Laws—Violation	Municipal Ordinances	Murder—1st Degree	Murder—2nd Degree	Non-support	Nuisance	Obstructing Public Highway	Official Misconduct	Perjury
Johnston.....			20	2	1	44			2	9			5					
Jones.....						6				1			1					
Lee.....						22				1			2	1				
Lenoir.....						32			7	10			4					1
Lincoln.....				1	2	4			2	2			2	2				
Macon.....					1	6				2					1			
Madison.....			3			7			2	1				1			1	
Martin.....			2		2	8			2	3			1					
McDowell.....	2				1	8			4	10			1	2				
Mecklenburg.....	5		1	1	3	88			18	18	4		16	3			1	5
Mitchell.....						6				4	1							
Montgomery.....			2			19			7	5								
Moore.....						12			8	2			1					
Nash.....	1		40	1	1	85			1	8			6					
New Hanover.....	1		23		1	41			4	13		1	7	3				
Northampton.....						1			1	2			2		1			
Onslow.....					1	10			5	4			1	5				1
Orange.....			4			23			3	10			1	5				
Pamlico.....						1												3
Pasquotank.....	1		1			7			1	4	1		2	2				

Chowan.....	7					1	1										1	35
Clay.....	4										1							23
Cleveland.....	19			1		3	4										3	147
Columbus.....	18			3			8									2	10	204
Craven.....	13					1	5				2						3	132
Cumberland.....	126			1		4	3				1					1	11	420
Currituck.....	2																	9
† Dare.....	1																	2
Davidson.....	27						9										2	102
Davie.....	20																2	71
Duplin.....	3																	6
Durham.....	53					1	21									2	13	90
Edgecombe.....	12						3									45	1	368
Forsyth.....	214			8		2	28									1	1	120
Franklin.....	12			1		1	1									83	3	931
Gaston.....	103			1		4	7				1					23	2	48
*Gates.....																		426
Graham.....	8						2											48
Granville.....	19			1			3									1		2
Greene.....	3			1			1										5	107
Guilford.....	46																	85
Halifax.....	14						3									2	1	596
Harnett.....	19						2										6	163
Haywood.....	39					1	1				1	1				1	6	149
Henderson.....	11					1	2									2	4	166
Hertford.....	7			1		1											1	140
Hoke.....																		46
Hyde.....	3															10		46
Iredell.....	12			2														13
Jackson.....	68			1			2				2						3	9
																1	88	146

*No Reports.

†Incomplete Reports.

STATEMENT D—Continued

COUNTIES	Poisoning	Prohibition Laws— Violation	Rape	Removing Crop	Resisting Officer	Robbery	School Laws— Violation	Seduction	Slander	Storebreaking	Trespass	Vagrancy	Worthless Checks	Miscellaneous	Totals as to Counties
Johnston.....		67		1		10		1		1	3			8	221
Jones.....		17												2	58
Lee.....		6													60
Lenoir.....		15	1			7		2					3	10	163
Lincoln.....		10				1					1			3	37
Macon.....		8						2			1			1	56
Madison.....		30													63
Martin.....		5				4					1			6	54
McDowell.....		26			1									4	94
Mecklenburg.....		59	1		2	23		1		16	1		2	6	462
Mitchell.....		57	2		1	1	1						2	4	116
Montgomery.....		13				3								1	86
Moore.....		4				3					1			1	66
Nash.....		15				3					1		2	6	231
New Hanover.....		38			2	11				19		3	1	7	260
Northampton.....		2												3	30
Onslow.....		40	4		1	2		1					1	1	118
Orange.....		46	2			2					1		1	6	172
Pamlico.....															11
Pasquotank.....		11				3				7		1			53

[illegible]

STATEMENT C-1

THE FOLLOWING STATEMENT SHOWS CRIMINAL CASES DISPOSED OF IN COURTS BELOW THE SUPERIOR COURTS,
REPORTING TO THIS BUREAU DURING THE FALL TERM, 1936, SPRING TERM, 1938.

COUNTIES	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle Pros.	Otherwise Disposed of	Total
Bertie.....	94	144	-----	216	22	205	29	4	-----	238
Brunswick.....	152	133	-----	273	12	193	77	15	-----	285
Buncombe.....	443	96	-----	491	48	511	15	12	1	539
Caldwell.....	464	95	-----	519	40	379	160	20	-----	559
Caswell.....	8	11	-----	17	2	16	3	-----	-----	19
Chatham.....	137	228	-----	353	12	298	67	-----	-----	365
Chowan.....	52	52	-----	94	11	75	26	2	1	104
Columbus.....	559	330	5	817	77	605	244	45	-----	894
Craven.....	132	220	-----	319	33	273	63	16	-----	352
Cumberland.....	543	541	12	940	156	745	332	19	-----	1,096
Davidson.....	824	222	-----	1,002	44	863	156	27	-----	1,046
Duplin.....	162	232	-----	364	30	279	48	65	2	394
Franklin.....	105	140	-----	237	8	205	40	-----	-----	245
Gaston.....	1,017	448	-----	1,327	138	1,260	99	106	-----	1,465
Granville.....	131	233	-----	345	19	289	54	21	-----	364
Halifax.....	210	451	-----	618	43	512	93	56	-----	661
Harnett.....	699	574	10	1,189	94	1,024	182	73	4	1,283
Haywood.....	405	51	-----	405	51	450	6	-----	-----	456
Henderson.....	296	100	-----	334	62	232	73	91	-----	396
Hertford.....	80	168	-----	238	10	192	38	18	-----	238
Iredell.....	242	162	-----	369	35	400	-----	4	-----	404
Lee.....	223	160	-----	348	35	307	65	10	1	383
Lincoln.....	154	35	-----	170	19	143	37	9	-----	189
McDowell.....	204	32	-----	228	8	235	1	-----	-----	236
*Mecklenburg.....	4,204	2,008	-----	5,521	691	5,068	798	341	5	6,212
Moore.....	317	318	-----	598	37	468	105	60	2	635
Nash.....	312	283	-----	568	27	365	124	106	-----	595
Northampton.....	102	174	-----	269	7	216	50	10	-----	276
Orange.....	275	243	-----	477	41	436	42	38	2	518
Pamlico.....	51	73	-----	121	3	78	31	11	4	124
Person.....	155	148	1	298	6	259	39	5	1	304
Pitt.....	149	232	-----	358	23	322	47	11	1	381
Richmond.....	172	115	-----	277	10	213	41	33	-----	287
Rockingham.....	487	378	-----	764	101	717	99	49	-----	865
Surry.....	537	55	-----	563	29	550	22	20	-----	592
Tyrrell.....	30	16	-----	43	3	31	12	3	-----	46
Union.....	338	265	-----	556	47	495	55	53	-----	603
Vance.....	340	205	-----	492	53	397	98	48	2	545
Wake.....	208	194	-----	371	31	314	69	19	-----	402
Washington.....	68	102	-----	156	14	132	38	-----	-----	170
Wilson.....	852	1,106	-----	1,722	236	1,743	104	91	20	1,958
Totals.....	15,933	10,773	28	24,366	2,368	21,495	3,682	1,511	46	26,734

*—1 Corporation.

STATEMENT D-1—Continued

COUNTIES	Abandonment	Abduction	Abortion	Alfray	Arson	Assault and Battery	Assault on Female	A. D. W.	Assault with Intent to Kill	Assault with Intent to Rape	Banking Laws—Violation	Bigamy	Breaking and Entering	Bribery	Buggery	Burglary—First Degree	Burglary—Second Degree	Burning—Other Than Arson
Johnston.....																		
Jones.....																		
Lee.....	1					43	10	22	1				5					
Lenoir.....																		
Lincoln.....	3					9	3	19					2					
Macon.....																		
Madison.....																		
Martin.....																		
McDowell.....				10		7	5	25					3					
Mecklenburg.....				36		259	11	234	1	1		1	13					
Mitchell.....																		
Montgomery.....																		
Moore.....	5			11		35	17	58	9				8					3
Nash.....	10			10		13	11	81		1			1		1			
New Hanover.....																		
Northampton.....	2			10		23	4	28	2									
Onslow.....																		
Orange.....	1			10		38	8	43										
Pamlico.....																		
Pasquotank.....	2			3		5		8					3					

STATEMENT D-1—Continued

COUNTIES	C. C. W.	Compounding Felony	Concealing Birth of Child	Conspiracy	Cruelty to Animals	Disorderly House	Disposing of Mortgaged Property	Disturbing Meetings	Election Laws—Violation	Embezzlement	Escape	Failure to List Taxes	False Pretense	Fish and Game Laws—Violation	Food and Drug Laws—Violation	Forcible Trespass	Forgery	Formation and Adultery
Johnston.....																		
Jones.....																		
Lee.....	11						1	2			1		2			1		2
Lenoir.....																		
Lincoln.....	2						1						3				1	
Macon.....																		
Madison.....																		
Martin.....																		
McDowell.....	7					2	1											4
Mecklenburg.....	63				1	17	7	5	3		7	1	14	2	2	7	1	20
Mitchell.....																		
Montgomery.....																		
Moore.....	18				2	13	1		2		1	1	10	3		13	2	4
Nash.....	5						1	5	1		3		1	1		1		11
New Hanover.....																		
Northampton.....	8						1	7					1	1		1		
Onslow.....																		
Orange.....	5												2	1				1
Pamlico.....	3													3				
Pasquotank.....											2							

Chowan.....	1				2	16	1			14			5				
Clay.....																	
Cleveland.....																	
Columbus.....					9	54				219		1	5	4	2		1
Craven.....					1	49				37			1	4			
Cumberland.....	22					125											
Currituck.....																	
Dare.....																	
Davidson.....	43				5	27	9		1	240	13	1	9				
Davie.....																	
Duplin.....	2			1		23				42			8	13	3		
Durham.....																	
Edgecombe.....																	
Forsyth.....																	
Franklin.....	1				1	33				24							
Gaston.....	69	1	1		7	78			1	135	46		6				
Gates.....																	
Graham.....																	
Granville.....	4				3	33				78			7	1			2
Greene.....																	
Guilford.....																	
Halifax.....	17				4	60				77			5	2			
Harnett.....	14	6	4		10	85				143	5		4		1		1
Haywood.....	15				7					13	4						
Henderson.....	38				6	33		1		52			8	3			
Hertford.....																	
Hoke.....	8				1	11				34			3		1		
Hyde.....																	
Iredell.....					1	41											
Jackson.....	8									42			3				

Chowan.....	37											3			2	104
Clay.....																
Cleveland.....																
Columbus.....	280			5	1							19		4	31	804
Craven.....	147	1			1									4		352
Cumberland.....	335	8		4	5							38	3	6	34	1,096
Currituck.....																
Dare.....																
Davidson.....	474	8			2							9		29	36	1,046
Davie.....																
Duplin.....	136	2		1	3							5		3	10	394
Durham.....																
Edgecombe.....																
Forsyth.....																
Franklin.....	94				2							1		4		245
Gaston.....	732	19	2		1	1						6	1	1	150	1,465
Gates.....																
Graham.....																
Granville.....	108	2		1	4	1	2							7	27	364
Greene.....																
Guilford.....																
Halifax.....	269	2			2							2		5	21	661
Harnett.....	589	6		5	2							28	1	10	41	1,283
Haywood.....	364				2							2	23	2	2	456
Henderson.....	101			1	2	1						7		2	19	396
Hertford.....	67															
Hoke.....				1	2	1								2	2	248
Hyde.....																
Iredell.....																
Jackson.....	163					6						1			36	404

STATEMENT E

COMPARATIVE STATEMENT AS TO SEX, RACE, JUDGMENT, ETC.	Superior Courts		Courts Below Superior Courts	
	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938
Males.....	12,467	12,853	29,601	24,365
Females.....	775	890	2,641	2,368
Corporations.....	1	-----	1	1
Total.....	13,243	13,743	32,243	26,734
White.....	8,129	8,319	19,533	15,932
Colored.....	4,979	5,262	12,646	10,773
Indian.....	134	162	63	28
Corporations.....	1	-----	1	1
Total.....	13,243	13,743	32,243	26,734
Convictions, including submissions.....	9,543	9,898	26,127	21,495
Acquittals.....	1,553	1,567	4,174	3,682
Nolle Pros.....	2,093	2,231	1,897	1,511
Otherwise Disposed of.....	54	47	45	46
Total.....	13,243	13,743	32,243	26,734

STATEMENT F

ALPHABETICAL LIST OF CRIMES—(SUPERIOR COURTS)	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938
Abandonment.....	143	150
Abduction.....	9	14
Abortion.....	9	10
Affray.....	52	74
Arson.....	34	41
Assault and Battery.....	312	401
Assault on Female.....	195	196
A. D. W.....	1,128	1,103
Assault with Intent to Kill.....	159	161
Assault with Intent to Rape.....	76	100
Banking Laws—Violation.....	8	3
Bigamy.....	52	49
Breaking and Entering.....	873	1,070
Bribery.....	4	2
Buggery.....	31	47
Burglary—First Degree.....	2	2
Burglary—Second Degree.....	74	83
Burning other than Arson.....	17	20
C. C. W.....	182	189
Compounding Felony.....		
Concealing Birth of Child.....	1	7
Conspiracy.....	10	36
Cruelty to Animals.....	10	11
Disorderly House.....	66	60
Disposing Mortgaged Property.....	23	23
Disturbing Meetings.....	29	24
Election Laws—Violation.....	3	1
Embezzlement.....	112	142
Escape.....	42	49
Failure to List Taxes.....	1	2
False Pretense.....	126	123
Fish and Game Laws—Violation.....	33	60
Food and Drug Laws—Violation.....	8	11
Forcible Trespass.....	138	163
Forgery.....	282	356
Fornication and Adultery.....	92	112
Gambling or Lottery.....	207	139
Health Laws—Violation.....	2	2
Housebreaking.....	531	470
Incest.....	10	11
Injury to Property.....	68	63
Larceny and Receiving.....	2,283	2,318
License, Doing Business Without.....	16	12
License, Practicing Profession Without.....	6	2
Manslaughter.....	238	293
Motor Vehicle Laws—Violation.....	823	757
Municipal Ordinances.....	16	27
Murder—First Degree.....	25	5
Murder—Second Degree.....	317	306
Non-Support.....	125	155

STATEMENT F—Continued

ALPHABETICAL LIST OF CRIMES—(SUPERIOR COURTS)	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938
Nuisance.....	45	82
Obstructing Public Highway.....	7	2
Official Misconduct.....	6	6
Perjury.....	24	42
Poisoning.....	6	6
Prohibition Laws—Violation.....	2,754	2,761
Prostitution.....	44	49
Rape.....	24	26
Removing Crop.....	18	7
Resisting Officer.....	75	91
Robbery.....	364	362
School Laws—Violation.....	1	5
Seduction.....	51	41
Slander.....	6	3
Storebreaking.....	226	212
Trespass.....	89	75
Vagrancy.....	22	32
Worthless Check.....	121	99
Miscellaneous.....	369	387
Total.....	13,243	13,743

STATEMENT F-1

ALPHABETICAL LIST OF CRIMES—(COURTS BELOW SUPERIOR COURTS)	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938
Abandonment.....	319	287
Abduction.....	4	5
Abortion.....	2	
Affray.....	469	308
Arson.....	4	
Assault and Battery.....	1,522	1,364
Assault on Female.....	567	455
A. D. W.....	2,070	1,743
Assault with Intent to Kill.....	14	75
Assault with Intent to Rape.....	4	6
Banking Laws—Violation.....		
Bigamy.....	4	3
Breaking and Entering.....	84	75
Bribery.....		
Buggery.....	3	1
Burglary—First Degree.....		
Burglary—Second Degree.....	1	4
Burning other than Arson.....	20	29
C. C. W.....	463	383
Compounding Felony.....		
Concealing Birth of Child.....		
Conspiracy.....	4	6
Cruelty to Animals.....	20	29
Disorderly House.....	73	88
Disposing Mortgaged Property.....	34	44
Disturbing Meetings.....	68	80
Election Laws—Violation.....	1	2
Embezzlement.....	23	20
Escape.....	84	75
Failure to List Taxes.....	37	41
False Pretense.....	45	83
Fish and Game Laws—Violation.....	62	61
Food and Drug Laws—Violation.....	8	6
Forceful Trespass.....	80	114
Forgery.....	17	10
Fornication and Adultery.....	193	169
Gambling or Lottery.....	638	710
Health Laws.....	22	18
Housebreaking.....	21	27
Incest.....	2	
Injury to Property.....	230	174
Larceny and Receiving.....	1,990	1,902
License—Doing Business Without.....	35	20
License—Practicing Profession Without.....	3	1
Manslaughter.....	11	15
Motor Vehicle Laws—Violation.....	4,752	3,379
Municipal Ordinances.....	1,034	804
Murder—First Degree.....		
Murder—Second Degree.....	3	6
Non-Support.....	226	238

STATEMENT F-1—Continued

ALPHABETICAL LIST OF CRIMES—(COURTS BELOW SUPERIOR COURTS)	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938
Nuisance.....	87	79
Obstructing Highway.....	9	
Official Misconduct.....		
Perjury.....	6	10
Poisoning.....	3	
Prohibition Laws.....	14,487	11,422
Prostitution.....	77	105
Rape.....	10	4
Removing Crop.....	45	26
Resisting Officer.....	166	117
Robbery.....	23	24
School Laws—Violation.....	7	7
Seduction.....	15	16
Slander.....	10	16
Storebreaking.....	4	9
Trespass.....	354	368
Vagrancy.....	82	107
Worthless Check.....	193	198
Miscellaneous.....	1,399	1,350
Total.....	32,243	26,734

STATEMENT G

COMPARATIVE STATEMENT OF DISPOSITION OF VIOLATIONS OF THE PROHIBITION LAW

	Superior Courts		Courts Below Superior Courts	
	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938	From July 1, 1936 to July 1, 1937	From July 1, 1937 to July 1, 1938
Convictions.....	2,094	2,140	13,043	10,348
Acquittals.....	305	264	1,058	818
Nolle Pros.....	346	346	379	249
Otherwise Disposed of.....	9	11	7	7
Total.....	2,754	2,761	14,487	11,422

FEES TRANSMITTED BY ATTORNEY GENERAL TO STATE TREASURER
SINCE FEBRUARY TERM 1936, THROUGH FEBRUARY
TERM, 1938

State v. Pace	\$ 10.00
State v. Spillman	10.00
State v. Murchison	10.00
State v. Hardy	10.00
State v. Hampton	10.00
State v. Waters	10.00
State v. Williams	10.00
State v. Humphreys	10.00
State v. Godwin	10.00
State v. Rhodes	10.00
State v. Early	10.00
State v. Webb	10.00
State v. Batts	10.00
State v. Moore	10.00
State v. Lancaster	10.00
State v. Stancell	10.00
State v. Herndon	10.00
State v. Puett	10.00
State v. McAllister	10.00
State v. Bridges	10.00
State v. Riggsbee	10.00
State v. Riggsbee	20.00
State v. Jones	10.00
State v. Atkinson	10.00
State v. Thompson	20.00
State v. May	10.00
State v. Ormand	10.00
State v. Flowers	10.00
State v. House	10.00
State v. Reynolds	10.00
State v. Farmer	10.00
State v. Evans	10.00
State v. Sentelle	10.00
State v. Vick	10.00
State v. Smith	10.00
State v. Taylor	10.00
State v. Oliver	10.00
State v. Cradle	10.00
State v. Wilcox	10.00
State v. Adams	10.00
State v. Jones	10.00
State v. Lewis	10.00
State v. Lee	10.00
TOTAL	\$450.00

THE WORK OF THE OFFICE

Since the publication of the Biennial Report of 1934-1936, a vacancy occurring on the Supreme Court by the death of Associate Justice George W. Connor on the 23rd day of April, 1938, the then Attorney General, A. A. F. Seawell, was appointed to fill the vacancy on that Court, and the present Attorney General, by appointment of Governor Hoey, succeeded him. Associate Justice Seawell, during his term of office as Attorney General, served the State in a most unselfish and highly efficient manner, leaving behind him a record of success unparalleled in the history of the Department. The positions of Assistant Attorneys General made vacant by the appointment of the incumbent as Attorney General, and the position of an additional Assistant allowed by the 1937 General Assembly, were filled by the Honorable Robert H. Wettach of Chapel Hill, and Honorable Lee Overman Gregory of Salisbury, North Carolina, and the office has had the benefit of their wide experience and most excellent services since that time. Under the provision of the controlling statute, Mr. Gregory was assigned to the Revenue Department. Mr. T. W. Bruton, who had heretofore been assigned to the Revenue Department, became the ranking Assistant Attorney General and his assignment to the Revenue Department terminated. During the Session of the 1935 General Assembly, provision was made for the employment of two law clerks, in order that a legal research staff might be added to this office. These positions are filled at the present time by Mr. Paul F. Mickey of Winston-Salem and Mr. James M. Verner of Asheville, both of whom are graduates of leading Law Schools of the State, are licensed Attorneys at Law, and were chosen upon the basis of legal attainment, ability, and training in legal research. Experience has shown that this addition to the Department has fully justified itself.

We print in the following pages a limited number of the more important official and advisory opinions rendered by this Department. The number of opinions so printed is limited by the appropriations for that purpose and we are following precedent by omitting a large number of the less important ones.

Exhibit I contains a list of civil cases pending or disposed of in the various courts and also of all cases in the Courts of the United States in which this office has participated. These cases relate to all phases of governmental services and activities. As the State has extended its services in new fields, State taxation has greatly increased and new problems are constantly arising.

In Exhibit II will be found a list of the criminal cases, showing their disposition, which were argued by the Attorney General and his Assistants before the Supreme Court of the State during the Fall Term, 1936; Spring Term, 1937; Fall Term, 1937; Spring Term, 1938.

OFFICE CONFERENCES AND CONSULTATIONS WITH STATE OFFICERS AND DEPARTMENTAL OFFICIALS

Under the provision of the State Constitution, Article III, Section 14, the Attorney General is made, ex officio, legal adviser of the Executive Department. Consolidated Statutes 7694 requires the Attorney General to represent all State institutions, including the State's prison, whenever requested so to

do by the official head of such institution, and to give, when required, his opinion upon all questions submitted to him by the General Assembly, or either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer.

The cooperative relations existing between the Attorney General's office and the heads of all the State's agencies and departments, as well as with other State officers, has made it very pleasant to perform the duties thus prescribed by the Constitution and the statute. Notwithstanding this happy relationship, the conferences and advice to various State officials has necessarily taken a great deal of the time of the Attorney General and his staff. The expanding activities of State government have given rise to increasing problems involving the application of new laws as well as the construction of old statutes.

Many questions arising in connection with the State's affairs have been presented to the office, most of which have been settled satisfactorily, and often litigation avoided.

UNEMPLOYMENT COMPENSATION LAW

The Special Session of 1936 enacted the Unemployment Compensation Law. At the request of the Governor, this office prepared the bill which was enacted by the General Assembly. Upon the creation of the Unemployment Compensation Commission, under the provisions of the Act the Commission employed its own attorneys, the expense of which is paid by the Administration Fund provided by the Federal Government. This office, however, has cooperated with the legal staff of the Commission and conferred with them frequently upon matters arising in connection with the administration of this law.

SOCIAL SECURITY LAWS

The regular Session of the General Assembly of 1937 enacted the Old Age Assistance, Aid to Dependent Children, and Aid to Needy Blind Acts in conformity with the Federal Social Security Act. At the request of the Governor, this office prepared the bills which were submitted to and passed by the General Assembly.

The creation of these extensive activities of the State Government and the interpretation of the law and its administration has made it necessary that this Department should be called upon frequently in advising the State Board of Charities and Public Welfare. With the able administration of the Acts, most of the difficulties have been ironed out and apparently it is now functioning successfully.

SPECIAL SESSION BOND ACT OF 1938 AND THE REVENUE BOND ACT OF 1938

At the Special Session of the General Assembly of 1938, this office was again requested by the Governor to prepare the two important measures adopted at this Session, the Special Session Bond Act of 1938 and the Revenue Bond Act of 1938.

Under the Institutions Revenue Bond Act of 1935, as amended, the University of North Carolina and other State institutions have made application for many improvements which have been approved by P. W. A. for

Grants in Aid. The applications and other legal formalities connected therewith have come to this office for approval, as well as the contracts entered into for the construction of the improvements.

BUREAU OF IDENTIFICATION AND INVESTIGATION

The 1937 General Assembly authorized the creation of the Bureau of Identification and Investigation, which has been set up by the Governor under the provisions of this Act. Dating back to 1867, the Attorney General's office has been required by law to collect criminal statistics from the various courts of the State. Under the provisions of the Act creating this Bureau, the collection of criminal statistics has been authorized to be transferred to it. The actual transfer of this activity took place in July, 1938. All of the statistical data accumulated by the Department during the biennium up to that date was transferred to the new Department. The tables set out in this report were provided by this Bureau.

MEETINGS OF THE EUGENICS BOARD

By law the Attorney General is made a member of the State Eugenics Board. This Board meets once each month in the office of the Commissioner of the State Board of Charities and Public Welfare. Cases are considered there which arise upon petition either from the various County Superintendents of Public Welfare of the State or the Superintendents of the various Charitable and Penal Institutions of the State. During the past biennium this Board has considered at open hearings three hundred and fifty-six cases. A member of the staff of this office is present at all meetings.

HABEAS CORPUS PROCEEDINGS

The Superintendent of the State Hospital at Raleigh has called upon this Department to represent that institution in all habeas corpus proceedings which have been instituted by patients at that hospital who have been committed there for care and treatment as inebriates. There have been approximately fifty such proceedings instituted in the various courts of this State. Each case has required the careful and painstaking consideration of some member of the staff of this Department.

ADVISORY OPINIONS TO LOCAL OFFICIALS

The Department has continued the historic practice of providing, upon requests of county, city and other local official bodies, advisory opinions upon numerous questions which have arisen in the administration of local government.

The Institute of Government publishes the magazine "Popular Government" which has for several years carried a digest of opinions of the office given to local units of government. This service has tended to unify practice and procedure with local governments and has made available to them the digest of the opinions of the office on subjects in which they are interested. If space permitted, it would be my desire to publish in this report a full copy of the digest of opinions provided in this manner. On account of the limitations of the report, there is herewith published a number of these opinions thus digested.

ATLANTIC AND NORTH CAROLINA RAILROAD

During the last year of the biennium, the litigation of the Atlantic and North Carolina Railroad with the Receivers of the Norfolk Southern Railroad Company was terminated by a consent decree in the District Court of the United States for the Eastern District of Virginia. The settlement of this litigation involved many details and consumed a great deal of time on the part of the office and private counsel selected during the administration of Governor J. C. B. Ehringhaus. The settlement as made was approved as being advantageous to the State, resulting in a substantial recovery for the Atlantic and North Carolina Railroad.

STATE DEPARTMENT OF JUSTICE BUILDING

By authority provided at the Special Session, 1938, of the General Assembly, a new State Department of Justice Building will be erected on the Hogg-Mordecai property fronting the Capitol. Upon the completion of this structure, it is planned that the office of Attorney General will be in this building. During the last few years the Department has been very much hampered on account of lack of necessary office space. Ample provision will be made for that in the new building.

EMPLOYMENT OF OUTSIDE COUNSEL

During the biennium it has not been found necessary to employ outside counsel in litigation arising in the Courts of this State or elsewhere.

The employment of counsel in the Atlantic and North Carolina Railroad litigation and litigation affecting the Inland Waterway was authorized previous to this biennium. This litigation necessarily required the employment of outside counsel as rules of practice in the Federal Court in the Eastern District of Virginia require that local counsel appear in any litigation therein. In addition, it would have been impossible for this office to have attended to the numerous details which arose in this litigation.

The litigation involving the securing of rights-of-way for the Inland Waterway was extensive and complicated. Counsel employed in this litigation have been active since the first authorization by the General Assembly of 1927. All of the litigation has been satisfactorily terminated, except eleven cases now pending in New Hanover County involving the Beaufort-Cape Fear link of the project.

SUMMARY OF THE CONSTITUTIONAL AND STATUTORY DUTIES OF THE
ATTORNEY GENERAL

References are herein given to provisions of the Constitution of North Carolina, and laws enacted in pursuance thereto, prescribing the duties and functions of the Attorney General.

As legal adviser to the Council of State and as a member of the various boards and commissions hereinafter listed, the participation of the Attorney General in the consideration of matters coming before meetings of the Council of State and such Boards and Commissions will be disclosed in the reports made therefrom. It is not required that they should be further detailed in this report.

The Constitution of North Carolina, Article III, Section 13, provides that the duties of the "Attorney General shall be prescribed by law." Pursuant to this section, the General Assembly has vested in the Department of the Attorney General the following powers, obligations, and duties:

C. S. 7694. "Duties.—It shall be the duty of the attorney general—

"1. To defend all actions in the supreme court in which the state shall be interested, or is a party; and also when requested by the governor or either branch of the general assembly to appear for the state in any court or tribunal in any cause or matter, civil or criminal, in which the state may be a party or interested.

"2. At the request of the governor, secretary of state, treasurer, auditor, corporation commissioners, insurance commissioner or superintendent of public instruction, he shall prosecute and defend all suits relating to matters connected with their departments.

"3. To represent all state institutions, including the state's prison, wherever requested so to do by the official head of any such institution.

"4. To consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office.

"5. To give, when required, his opinion upon all questions of law submitted to him by the general assembly, or by either branch thereof, or by the governor, auditor, treasurer, or any other state officer.

"6. To pay all moneys received for debts due or penalties to the state immediately after the receipt thereof into the treasury.

"7. To compare the warrants drawn by the auditor on the state treasury with the laws under which they purport to be drawn."

In addition to these duties, the following ones are prescribed:

To institute actions to recover taxes due under the Revenue Act (C. S. 7880 (167)), and to approve all tax refunds made by the State (C. S. 7979 (a)).

To enforce the statutes relative to monopolies and trusts (C. S. 2567-2573).

To institute actions to prevent ultra vires acts on the parts of corporations, or to dissolve corporations for certain offenses (C. S. 1143, 1185, 1187).

To institute quo warranto proceedings to oust public officers who refuse to perform their official duties, and to begin actions to protect State lands (C. S. 870).

To see that the solicitors prosecute violations of the act relating to the practice of medicine (C. S. 6625).

To enforce charitable trusts (C. S. 1143).

To prescribe the rules of practice for land registration under the Torrens Act (C. S. 2379).

To institute proceedings for the dissolution of fraternal insurance societies (C. S. 6524-6525).

To appeal on behalf of the court or other officer on appeal in contempt proceedings (C. S. 980).

To investigate extradition cases, at the request of the Governor (C. S. 4556 (d)).

To institute actions to enforce the rulings and orders of the Utilities Commission, and to represent said Commission in the enforcement of intrastate rates before the Interstate Commerce Commission and in federal or state courts (C. S. 1062 and 1065).

To give advice to the State Board of Elections as to the form of ballots (C. S. 6046).

To institute action against persons, firms, or corporations who violate the

terms of the act regulating the quality of agricultural seeds. This duty may be delegated to the solicitor (C. S. 4828).

To approve deeds and grants to the State of property given to, or purchased by, it for park purposes (C. S. 6124).

To collect from inmates of state institutions the cost of their upkeep, provided they are able to pay (C. S. 7534 (k)).

To approve the grant of easements by state institutions to public-service corporations (C. S. 7525).

To compare warrants drawn by the Auditor on the treasury with the forms under which they were purported to have been drawn (C. S. 7693).

The Attorney General is a member of, or adviser to, the following boards, councils, and commissions: Legal adviser to the Executive Department (Const., Art III, S. 14); member of the State Board of Education (C. S. 5394), of the State Board of Assessments (C. S. 7971 (3)), of Advisory Board of Paroles (C. S. 7757), of Advisory Commission for the Commissioner of Banks (C. S. 220), of the State Text-Book Purchase and Rental Commission (C. S. 5754 (1)), of Board of Public Buildings and Grounds (C. S. 7025), of Municipal Board of Control (C. S. 2779), of the Eugenics Board (C. S. 2304 (q)); and legal adviser to the Soldier's Settlement Board (C. S. 7508).

SUMMARY OF IMPORTANT LITIGATION

In accordance with the practice heretofore followed, there are listed here some of the more important civil cases which have arisen or have been terminated during the biennium.

Carolina Aluminum Company v. Federal Power Commission (Tuckertown Case)

On June 7, 1937, pursuant to the terms of the Federal Power Act, the Carolina Aluminum Company filed a declaration of its intention, with the Federal Power Commission, to construct a dam and hydroelectric plant on the Yadkin River near Tuckertown, N. C. A hearing was held before an examiner for the purpose of enabling the Federal Power Commission to make the investigation provided in the Federal Power Act, to find whether or not the interests of interstate or foreign commerce would be affected by the proposed construction. Subsequently, upon a statement of the Department of Conservation and Development of North Carolina that it possessed information relative to the effect of the Tuckertown project upon navigation, the Federal Power Commission, on its own motion, called a further hearing at which time representatives of the State of North Carolina presented evidence. On November 16, 1937, the Federal Power Commission handed down its finding that the interests of interstate or foreign commerce would be affected by the proposed hydroelectric plant at Tuckertown. The Practical effect of this finding was to enjoin the construction of the project until a license was secured under the provisions of the Federal Power Act. Petition for a rehearing was denied by the Commission, and a petition for review, filed in the Fourth Circuit Court of Appeals, was dismissed on June 6, 1938, on the ground that the court had no jurisdiction to review a finding of fact of the Federal Power Commission. This case is reported in 97 F. (2d) 435.

State v. Lawrence

This is a case instituted in the criminal court of Forsyth County to test the validity of Chapter 155, Public Laws of 1935, commonly known as the Photographers Act. The defendant was indicted for failure to apply for and procure a license from the State Board of Photographic Examiners. From his conviction and sentence in the Superior Court, he appealed to the Supreme Court, and the conviction was sustained. The defendant then applied to the Supreme Court of the United States for a writ of certiorari, and the petition was denied. This case is reported in 213 N. C. at page 674, and at the present writing has not been printed in the Advance Sheets of the United States Supreme Court Reports.

A. G. Turcke v. Clyde R. Hoey, Governor, et al.

This was an action instituted in the United States District Court for the Eastern District of North Carolina to restrain the Commissioner of Revenue from levying a tax or in any way interfering with the plaintiff, who was engaged in the business of making and selling photographs in this State. A temporary restraining order was signed by the Court, and a motion was made by this office to dismiss the case on the ground that the District Court had no jurisdiction. Voluminous pleadings were filed by the plaintiff and after a hearing in Elizabeth City, the Court allowed the motion for nonsuit. Plaintiff then filed a petition for a writ of certiorari in the Supreme Court of the United States. The petition was denied.

C. T. H. Corporation v. A. J. Maxwell, Commissioner of Revenue

This is a case involving the franchise tax liability of a foreign corporation domesticated and doing business in this State, which, in accordance with the purposes of its organization, purchased land at foreclosure sales of mortgages held by a mortgage company. It maintained an office and a process agent in this State, but only for that purpose. It did not maintain an office here for the transaction of its business, but rented properties purchased by and through local rental agencies. It held title to real estate in this State in excess of \$500,000. The Supreme Court held that this corporation was doing business in this State within the meaning of the sections of the Revenue Act which impose a corporate franchise tax upon foreign corporations doing business in this State. Although the amount of tax involved in this litigation was comparatively small, amounting to approximately \$2,000, the decision in this case determined the disposition of other cases pending by corporations similarly situated. This case was reported in 212 N. C., 805.

Atlantic Ice and Coal Company v. A. J. Maxwell, Commissioner of Revenue

This was an action to recover State license taxes paid under protest by the plaintiff to the defendant under the chain store tax section of the 1933 Revenue Act. The plaintiff, a foreign corporation domesticated in this State, was engaged in the business of selling coal and ice at wholesale and retail in this State. It maintained and operated in this State thirteen coal yards and the Commissioner of Revenue levied a chain store tax upon this chain

of coal yards so operated, the Court holding that the thirteen separate places of business where the plaintiff sold coal were "mercantile establishments" within the meaning of the chain store tax section of the Revenue Act. This case is reported at 210 N. C., 723.

State v. Bill Payne and Wash Turner

This is a criminal action tried in the Superior Court of Forsyth County, in which the defendants were charged with murder in the first degree. They were convicted and sentenced to death and from such conviction and sentence, appealed to the Supreme Court of North Carolina. The record in this case, as certified to the Supreme Court, was voluminous and contained six hundred eighty-eight exceptions. Necessarily, a great deal of time and study was given to the preparation of the brief for the State. The argument in this case was made by the then Attorney General A. A. F. Seawell, now Associate Justice of the Supreme Court. The Supreme Court affirmed the judgment of the lower court and this case is reported in 213 N. C., 428. This case aroused state-wide interest; the defendants were charged with murdering State Highway Patrolman George Penn after a prolonged running fight upon the highways of this State in Buncombe County by the two defendants and George Penn. After running the defendants into a blind road, Penn was shot down. The defendants escaped and were recaptured a short time thereafter by agents of the Federal Bureau of Investigation and returned to Buncombe County for trial.

Extradition of Fred Erwin Beal

At the request of Solicitor John G. Carpenter, extradition papers were issued for Fred Erwin Beal, one of the defendants convicted in Mecklenburg County for the murder of Chief of Police Aderholt of Gastonia during the labor troubles in 1929. This defendant had been located at his home in the State of Massachusetts and was detained there under warrant issued in that State. News accounts indicated the organization of a committee for the defense to contest extradition. In conference with the defendant and his attorney in the City of Boston, it was arranged that the defendant would voluntarily surrender to the North Carolina authorities. This plan was carried out and the defendant surrendered and is now serving his term.

Elva Statler Davidson Estate

Elva Statler Davidson died in Moore County in February, 1935, having become a citizen of the State of North Carolina just a few months prior thereto. The deceased was interested in three trust estates held by trustees, personal and corporate, in Massachusetts. The State asserted a claim for inheritance taxes on the net value of the assets of these trusts, consisting of intangibles. Litigation was instituted in the probate court in Boston, but did not involve the determination of the taxation question. After intensive negotiations, the estate paid the inheritance taxes claimed by the State, amounting to approximately Twenty Thousand Dollars.

Atlas Supply Co. v. Maxwell

The Emergency Revenue Act of 1937 imposed on wholesalers a tax of three per cent of the value of goods sold "to any other than a merchant for resale." On sales of goods to merchants who resold at retail the tax was much lower. The Commissioner of Revenue ruled that sales of plumbing fixtures by wholesale houses to contractors to be used in erecting, repairing or altering plumbing and heating systems were taxable at the higher rate. Atlas Supply Company, a wholesale dealer in plumbing fixtures, brought suit under the Declaratory Judgment Act to determine the validity of the regulation.

The Supply Company contended that the plumbing and heating contractors to whom it sold fixtures resold them to the owners with whom they had contracted to install or repair a system of heating or plumbing. The Attorney General and Assistants maintained that such sales under lump-sum contracts, were not sales of the personal property, but were sales of a complete job or system. Thus, sales to contractors for use in such jobs were not made for the purpose of resale.

Judge Sinclair heard the case in Superior Court and affirmed the ruling of the Commissioner of Revenue. This ruling was affirmed by the Supreme Court upon the argument advanced by the Attorney General. This case is reported in 212 N. C., at page 624.

State of North Carolina, Ex Rel, A. J. Maxwell, Commissioner of Revenue v. D. C. Waddell, Jr.

The owner of a building located in Asheville, North Carolina, devised the property in trust to D. C. Waddell, he to collect all rentals and pay therefrom a stipulated annuity to a named beneficiary. The remainder of the rental income was to become his own personal property. Upon death of the deviser the building was appraised at \$175,000 for inheritance tax purposes, \$106,116 of the valuation was apportioned by the Commissioner as Waddell's interest and inheritance taxes thereupon were assessed against Waddell personally, and paid by him.

Over a ten year period thereafter the Commissioner annually assessed income taxes against Waddell on all rentals collected by him in excess of the amounts paid to the holder of the annuity. Waddell paid these taxes under protest and sued to recover same. He contended that the income to him from the building was the bequest, and that until he had received therefrom an amount equal to the apportioned value of the building on which he had paid inheritance tax, all rentals received by him was not income, but a part of the gift.

The Superior Court overruled contentions of the plaintiff, and its decision was affirmed on appeal to the Supreme Court (212 N. C., 572). The question had previously been considered by the Supreme Court of the United States, and chiefly upon that authority our Court stated that (1) the North Carolina statute taxed all incomes of trust estates distributed to the beneficiary during the tax year and (2) that for income tax purposes the value of the corpus of a trust estate must be considered as separate and distinct from the income received therefrom.

*James Calcutt, Trading as the Vending Machine Company v.
N. H. McGeachy, et al.*

Since 1923 the North Carolina Legislature has enacted five laws designed to repress gambling by use of slot machines. Each act was more inclusive than the last and the final one, Chapter 196, Public Laws 1937, prohibited not only sale or use of machines which did not give returns of equal value for the coin deposited, but also machines registering "varying scores or tallies upon the outcome of which wagers might be made," irrespective of whether it might also deliver some merchandise of equal value.

Calcutt, a manufacturer and distributor of various types of slot machines, had located many machines of the latter description in this State. The sheriff of Cumberland County and certain municipal law enforcement officers threatened to prosecute Calcutt criminally and civilly to enforce the act. Calcutt brought proceedings under the Declaratory Judgment Act to determine constitutionality of the law as applied to his machines.

The Superior Court and Supreme Court ruled the act constitutional, expressly upholding the broad discretion of our Legislature in exercising its police power to control gambling. The opinion gives judicial sanction to legislative efforts to outlaw any machine by which an element of chance is presented. This case is reported in 213 N. C., at page one.

Upon this decision by the State Court, Judge I. M. Meekins, of the United States District Court for the Eastern District of North Carolina, dissolved an order which he had previously issued restraining State law enforcement officers from seizing machines of the same type placed in various parts of the State by another vendor and distributor, one Morris, of Ohio. This proceeding, *Morris v. Madrin*, attracted wide attention among law enforcement officers and the citizens of the State generally by reason of the apparent undue interference by the Federal Court with administration of State laws.

Two other cases involving license taxes upon slot machines had been brought in the same federal court against the Commissioner of Revenue. The first, *Womble v. Maxwell*, in which the distributor of musical instruments operating on the coin-in-slot principle contested as excessive a license fee levied in the Revenue Act of 1935, was settled between the parties. In the second, *L. C. Barrett v. Maxwell*, Barrett obtained a temporary order restraining the Commissioner from collecting a full year's license fee on machines which thirty days thereafter were to become illegal under the new 1937 Slot Machine Law. Upon hearing by a three judge court, the order was dissolved.

Town of Weaverville v. Hobbs, Commissioner

Few cases decided by the State Supreme Court within the last biennium aroused more interest or difference of opinion than this one. The question presented was simple: Is property owned by the State and held for the use and benefit of the World War Veterans Loan Fund exempt from taxation by the municipality wherein it is located under Article V, Section 5 of the State Constitution. That section provides: "Property belonging to the State or to municipal corporations, shall be exempt from taxation."

A majority of the Court held the property was exempt. The Chief Justice and Associate Justices Schenck and Clarkson dissented upon the ground

that property owned by the State is not exempt from taxation unless used for a strictly governmental function. The administration of the Veterans Fund was said not to be such a function, though previously held a "public purpose" in *Hinton v. State Treasurer*, 193 N. C., 496.

In a lone opinion concurring in the result of the case Justice Connor took the advanced position that under the words of the Constitution mere ownership by the State carries exemption, regardless of the purpose for which the property is held.

Apparently the opinion written by Justice Devin, in which Justices Winborne and Barnhill concurred, does not go so far but says only that the property here was exempt because it was held for a governmental purpose under *Hinton v. State Treasurer*. This case is reported in 212 N. C., at page 684.

Shell Eastern Petroleum Products, Inc. v. Maxwell

The importance of this case was noted in the Report of the Attorney General 1934-1936, at which time it was pending in Federal District Court. All the large oil companies had changed their contracts and leases with filling station operators to avoid the chain store tax of 1935. Shell Eastern alone was assessed upon one hundred thirty filling stations which the Commissioner ruled it controlled. It denied control, suing to recover \$9,000 in taxes collected.

The District Court found in the contracts such elements of control as would render the Shell Company liable for the tax. 90 Fed. 2nd 39. The Supreme Court denied the Company's application for writ of certiorari, 82 L. ed. 24.

A. Leslie Harwood v. Maxwell, Commissioner of Revenue

This case presented an interesting question of statutory construction under the State inheritance tax statute. The Revenue Act of 1933, in determining clear market value of property for inheritance tax purposes, allowed deductions for Federal estate taxes paid, "except additional estate taxes levied by Act of Congress, effective 6 June, 1932." The schedule of additional estate taxes levied by Act of Congress on June 6, 1932, was changed by an Act effective May 11, 1934. But the tax levying provision of the 1932 Act was not reenacted, and the schedule of rates fixed in 1934 depended upon the tax levying provision of the 1932 Act.

In paying State inheritance taxes plaintiff claimed a deduction of \$7,927 for estate taxes paid under the 1934 schedule, contending that the 1934 Act was independent of that of 1932. The Commissioner disallowed the deduction and plaintiff sued to recover. The Superior Court dismissed the action and its judgment was affirmed on appeal. The Court opined that "where the schedule of rate in a revenue act is changed by amendment, with the force and effect of the law left dependent upon the tax-levying clauses in the original act, it is proper to say that the taxes levied thereunder . . . are levied by the original act." This case is reported in 213 N. C., at page 55.

*American Telephone and Telegraph Co. v. A. J. Maxwell,
Commissioner of Revenue*

Of great interest to the State is this action, brought by the American

Telephone and Telegraph Company to recover \$78,299.76 paid to the Commissioner in income taxes for the years 1935, 1936, and 1937. The suit is now pending in the Superior Court of Wake County.

Plaintiff is a New York Corporation; it controls by stock ownership a group of associated companies which furnish between eighty and ninety per cent of local telephone service, and ninety-eight per cent of the long distance wires. Southern Bell Telephone and Telegraph Company is the associated company in this region. The associated companies maintain their own local and interstate lines. But the American Company owns the nationwide system of intrastate wires over which the associated companies must transmit their long distance messages. The parent company rents these lines to the subsidiary.

In addition, the American Company sells all equipment to its associated companies, dominates all policies of finance, engineering, personnel, rates, etc.

These "services" are rendered on contract, for which the associated company pays the parent company a fixed fee or commission. The system of inter-dependence of the companies is very elaborately devised to divorce the American Company from the appearance of local activity. It was the belief of the Commissioner of Revenue, upon the advice of the Attorney General, that the company was nevertheless doing a substantial local business. The company maintains that such local business as it may be doing is only "incidental" to its intrastate business, and that its income is not taxable.

OPINIONS TO GOVERNOR

SUBJECT: WORKMEN'S COMPENSATION; WORKERS ASSIGNED BY RESETTLEMENT ADMINISTRATION; PAYMENT OF PREMIUMS ON INSURANCE COVERAGE, ETC.

28 September, 1936.

Receipt is acknowledged of a copy of your letter of September 15, to Mr. George S. Mitchell, Regional Director, Resettlement Administration, attaching thereto a letter from Mr. Mitchell under date of September 14.

The first question asked by Mr. Mitchell is as follows:

(1) May the public funds of the State and political subdivisions thereof and other local governing or public administrative bodies be used for the payment of premiums or workmen's compensation insurance or other equivalent form of insurance covering signatories of voluntary work agreements?

In the case of Jackson vs. City of Raleigh, 206, N. C. 274, (1934), our Supreme Court held that a relief worker assigned to work for the City of Raleigh in its woodyard was not an employee of the City of Raleigh and denied the claim for compensation for injury received by accident arising out of and in the course of his work. The claimant in this case was a resident of the City of Raleigh in need of support for himself and family. He appealed to the Welfare Department of Wake County for work. This Department procured the work for him as a relief worker through the North Carolina Emergency Relief Administration, which paid the worker at the rate of \$2.25 per week from funds furnished by the Federal Emergency Relief Administration pursuant to an Act of Congress.

In a similar case of Bell vs. Raleigh, 206, N. C. 275 (1934), the court reached the same conclusion.

In the case of Mayze vs. Forest City, 207, N. C. 168 (1934), the court held compensable a worker employed by the City of Forest City who is employed by Forest City but paid out of funds procured by the town from the Reconstruction Finance Corporation, distinguishing the Jackson and Bell cases. It appears from the letter from Mr. Mitchell that the relationship between the assigned workers to the State and political subdivisions will be the same as it was in the Bell and Jackson cases, and according to these cases such person would not be deemed an employee of the State or local governmental subdivision.

Under the workmen's compensation law, all employees of the State and local governmental subdivisions are covered by the provisions of the act, and under Section 67, the employer is required to insure and keep insured all liability arising under the act unless the employer qualifies as a self-insurer as provided in the act.

Apparently, there is no provision in the law to justify the state or local subdivision in assuming compensation liability for persons who are not employees of the State and local subdivisions within the meaning and intent of the act. If such persons are not employees of the State or local subdivision of the government, there is no provision in the law which would authorize the payment of public funds for insurance premiums on workmen's compensation insurance insuring liability which would not exist against them.

The second question is as follows:

(2) Are the State and its political subdivisions and other local authorities authorized by law to assume liability for injuries sustained by assigned voluntary work agreement signatories?

This question is answered above. In my opinion, the State and its political subdivisions cannot assume any responsibility for liability which has not been created by law.

The third question is as follows:

(3) Will assigned voluntary work agreement signatories be otherwise similarly protected by such insurance by the operating of the provisions of any other applicable State statute?

If the assigned voluntary work agreement signatories are in fact insured by the State or local subdivision of government, the insuring company would be liable only by way of estoppel. *Jones vs. Planters National Bank & Trust Company*, 206 N. C. 214. As against the State or local subdivision, in my opinion, there would not exist any compensation liability to such injured party under the decision in the *Jackson and Bell* cases.

SUBJECT: NOTARIES PUBLIC; EXTRA-TERRITORIAL ACTS

20 January, 1937.

Your inquiry relates to letter of A. W. Price, of Portsmouth, Va., and his request that privilege might be extended to him to act as a Notary Public in this State under his Virginia appointment.

It is evident that Mr. Price misinterpreted the letter of former Governor Ehringhaus, declining to appoint him as a Notary Public in North Carolina on the ground of nonresidence, but informing him that his Virginia seal would be recognized in this State.

Of course, Mr. Price could not act as Notary in this State by virtue of his Virginia commission, and such acts as he may have done in the past by way of taking acknowledgments to documents, or, in fact, any act done by him under the assumption that Governor Ehringhaus' letter extended to him the privilege of acting in this State, would be invalid.

It is impossible for you to "extend" his supposed authority, as he really had none.

SUBJECT: DOUBLE OFFICE HOLDING; TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AND VARIOUS STATE INSTITUTIONS; CONSTITUTION, ARTICLE XIV, SEC. 7.

23 February, 1937.

In answering your inquiry on the above subject, I may say that a number of private requests have been made to this Department for a ruling on the question, which inquiries I have not thought proper to answer. It has been a rule of this office, established long before I became connected with it, to render no opinions to private inquirers, especially on controverted matters and where an answer to the inquiry was not imperatively demanded in the public interest. I am glad, however, to answer your official inquiry as best I may.

Dean Van Hecke, of the University Law School, has written a letter upon the subject, which you have doubtless seen. The position taken in that letter is, I think, correct, and I might write you more briefly except for the

necessity of having a considered opinion in the files of this office for future reference.

The answer to your inquiry turns upon a proper classification of the positions mentioned in your letter, namely, Trustees of the University and of the State Hospitals and other charitable institutions.

I consider first the position or place of Trustee of the University of North Carolina, as most of the inquiries relate to that position. The Constitution of North Carolina, Article XIV, Section 7, reads as follows:

"7. Holding office. No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes."

Similar provisions were contained in former Constitutions, and amendments thereto, and the proviso is of long standing and has been considered in some of the opinions herein cited.

That the position or place of Trustee of the University is an office, as defined in this section of the Constitution, is conceded;—Clark vs. Stanley, 66 N. C., 60; Welker vs. Bledsoe, 68 N. C., 457; but, in my opinion, the weight of authority strongly supports the position that Trustees of the University are such officers as come within the exceptive proviso in this section of the Constitution, and must be classed as *commissioners of public charities* within its meaning.

In fact, it seems rather clear that the framers of the Constitution had in mind the fact that those who by reason of outstanding qualities of character, intelligence, sound judgment and administrative ability almost inevitably would be chosen for public office of one sort or another, and did not wish to deprive institutions like the University of North Carolina, and other public institutions of the same general class, of the service of such men in positions which, however important and honorable, are not remunerative. So, if our classification is correct, the holding of another "office or place of trust or profit under the United States, or any department thereof, or under this State or under any other state or government" would not make such officer ineligible to serve as Trustee of the University.

This question is not presented directly in any of the opinions of the State Court which have been suggested to me as determinative of the matter. As far as I am able to discover, our Supreme Court has never held that a Trustee of the University was such an officer as would preclude him from holding another office; and an examination of the cases on the subject rather leads to the contrary conclusion.

In Welker vs. Bledsoe, 68 N. C., 457, the question before the Court was one of *quo warranto* "to determine who constitute the proper and legal Board of Directors of the Penitentiary." Article XIV, Section 7 of the Constitution, as it then stood, in which the proviso is the same as that in the present Constitution, was cited, and by way of illustration the Trustees of the University, the Directors of the Penitentiary, of the Lunatic Asylum, and the Institution for the Deaf, Dumb and Blind, were referred to as public officers. It will be noted here that in this immediate context the ex-

pression "*Commissioners of Public Charities*" is printed in italics. The opinion in this case certainly does not hold that the position or office of trustee of the University is offensive to the constitutional provision in question, but, on the contrary, it seems clear that the effect of this opinion is to place Trustees of the University, Directors of the Penitentiary, of the Lunatic Asylum, and the Institution for the Deaf, Dumb and Blind, in the same category of public offices, to-wit, Commissioners of Public Charities. This seemed so obvious to Chief Justice Pearson, who wrote the opinion for the Court, that he did not deem it necessary to elaborate or explain.

Educational institutions maintained at public expense, in which free tuition is in whole or in part given to the students, have been usually classified as "*charitable undertakings*." *Wachovia Bank & Trust Co. vs. Ogburn* 181 N. C., 324; *State vs. McGowan*, 37 N. C., 9; *Keith vs. Scales*, 124 N. C., 497, 32 S. E. 809.

The common acceptance of the term "charity" as almsgiving, is entirely too narrow to comprise the more comprehensive classification given to the term "public charities," as that expression was understood at the time of the adoption of our several constitutions and amendments thereto relating to this subject; and the expression as used in the Constitution, Article XIV, Section 7, must necessarily retain the same historic implications. *State vs. Knight*, 169 N. C., 333.

At the common law, in the English statutes, and in the earlier laws of this country, the original conception of "public charities" included free public education, and I find nothing in our Reports indicating a contrary purpose in the use of the term.

As early as the year 1600, public education through schools and universities was considered as being a "charitable purpose"; (43 Eliz. c. 4) and it is still so regarded in English law;—*ex parte University College of North Wales* (1909), 78 L. J. K. B., p. 316; *Dexter vs. Harvard College*, 176 Mass., 192; *College for Women vs. Calvert*, 87 Conn., 421; *Words and Phrases*, Vol. 6, p. 5779; *Keith vs. Scales*, *supra*; *Welker vs. Bledsoe*, *supra*; *Wachovia Bank & Trust Co.*, *supra*; *State vs. McGowan*, *supra*; *Barden vs. Atlantic etc. R. R. Co.*, 152 N. C., 318, 327, 67 S. E. 971.

It is true that in many statutes the subjects included in the general term "public charities" have been separately catalogued for the purpose of clarity, and have been differently treated, particularly with respect to the administration of tax exemption laws. An examination of such statutes will show that distinctions were made only for the purposes of the including act in which they were mentioned.

I might say further that the Legislature has proceeded at its every session for more than a generation to elect Trustees of the University and Trustees of the various other institutions mentioned in your letter, and have so elected men holding almost every sort of other office created by law. This affords an administrative and a legislative interpretation of the law which would have great weight with the Court in construing the section of the Constitution here considered.

I do not think it is necessary to consider separately Trustees of the State Hospitals and other charitable institutions, as these are obviously included in the foregoing reasoning.

I am of the opinion, therefore, that the office of Trustee of the University, the office of Trustee of the various State Hospitals, and other charit-

able institutions mentioned in your letter, may be held lawfully by a person holding any other public office, without infringement of Article XIV, Section 7 of the State Constitution.

SUBJECT: SEALS; CLERK SUPERIOR COURT—REPLACEMENT

8 October, 1937.

When originally the question of supplying seals to Clerks of the Superior Court by the Governor was raised, I felt that, inasmuch as there was no precedent for it, the particular application should stand on its own merits. I did not think then, and I do not think yet, that an ordinary seal used by the Clerk of the Superior Court, of which there are examples and which did not purport to be "seals of the court," should not be replaced by the Governor.

However, it seems to me that C. S. 7640, 7650, and 7651, are not capable of any other interpretation but that seals of the court should be so furnished. You will note how old these statutes are, and it is strange to me that they have not been repealed.

As to the pay for the making of such seals, as the law seems to require it and there is no fund to bear the expense, it would be a legitimate charge upon the Contingency and Emergency Fund.

SUBJECT: CONTEMPTS; POWER OF GOVERNOR TO PARDON

6 January, 1938.

The Constitution of North Carolina, Article III, Section 6, vests in the Governor of the State the power to "grant reprieves, commutations, and pardons, after conviction, for all offenses, except in cases of impeachment, upon such conditions as he may think proper." You inquire whether under this authority the Governor may pardon or parole a prisoner who is serving a term upon the public roads under a sentence for contempt of court.

We have gone rather extensively into the subject, its history in the English law, and its treatment in various jurisdictions, including our own. I do not wish to encumber this letter with the details of this investigation; but in order that you may understand the principles on which my opinion is based, I make the following brief observations:

If there is no authority whatever which may deal with the condition of a person serving a prison sentence for contempt, we have a situation which would be obnoxious to any reasonable system of law or justice;—the edict of the judge is as unalterable as the law of the Medes and Persians, not to be reached or modified by the judge himself or any other authority; and the prisoner must serve his sentence, although it may well happen that such service would be against the interest of justice, not conducive to the public good and destructive to the prisoner. It would be difficult to convince a court that such a situation could exist without remedy in a civilized government.

The cited section of the Constitution gives to the Governor the power to grant reprieves, commutations, and pardons to any person who has been "*convicted*" of an "*offense*."

It is hardly necessary here to draw any technical distinction between a "conviction," as used in this section, and the finding and judgment of the court in a contempt case. That part of the section was no doubt intended

to prevent anticipatory pardons. In my opinion, the finding of fact and sentence of court in a contempt case is a conviction within the meaning of the Constitution.

A more important question is whether a *contempt* is an offense within the meaning of the Constitution.

Attachments for contempt may be divided, according to the purpose of the contempt order, into two classes: First, where the proceeding is resorted to for the purpose of enforcing the order of the court in a civil matter, as, for example, where a court of equity commands the execution of a deed, or where a court imprisons for contempt to compel payment of alimony. Second, (as in ordinary cases of contempt) where the attachment or order is based on the idea of punishment for some act bringing the court into disrepute and thereby interfering with the administration of justice, either an act committed in the presence of the court, or one committed elsewhere but having the same effect. In *re Chiles*, 22 Wall. 157, 22 L. ed. 819; *Besette v. Conkey*, 194 U. S. 324, 337, 48 L. ed. 997.

As to the first class of cases, some authorities hold that the Governor is without power to pardon. In *re Nevitt*, 117 Fed. 448. This would depend, perhaps, upon the wording of the Constitution in the particular jurisdiction. It is not necessary to decide that question here.

As to the second class of contempts, it is very generally held that the Governor may pardon or parole the prisoner or commute the sentence, although there is authority contra. Again, we observe that the Constitution of the particular State might be controlling. Supporting the power to pardon may be cited: in *re Mason*, 43 Fed. 510; in *re Mullee*, 17 Fed. Case No. 9911; 7 Blatchf. 23; *State v. Sauvinet*, 24 La. Ann. Cases 119; *ex parte Hickey*, 4 Sm. & m. (Miss.) 751.

Upon an examination of the authorities, I am convinced that the word "offense," used in the Constitution, is properly applicable at least to contempts of the second class I have named.

In general, the authorities dealing with contempts of this nature use all the phraseology applicable to criminal offenses; they discuss the nature of the offense; in *re Lewis*, 202 U. S. 614, 50 L. ed. 1172, and speak of finding the defendant "guilty." The purpose of the contempt proceeding is not connected with any personal consideration for the judge, but only the ends of public justice. *Ex parte McLeod*, 120 Fed. 130. In the *Lewis* case above cited, it is held that "a contempt proceeding is *sui generis*. It is criminal in its nature in that the party is charged with doing something forbidden, and if found guilty is punished."

Of our statutes on contempt,—C. S. 978 to 986, inclusive,—our court has held that Section 978, containing a list of the acts punishable for contempt, must be strictly construed as a criminal statute. *West v. West*, 199 N. C., 12, 13; In *re Hege*, 205 N. C., 625, 630; and it is provided in C. S. 979 that an appeal lies from a "judgment of guilty," where the contempt is not in the presence of the court, or rather not included in subsections 1, 2, 3, and 6, in the same manner as is provided for appeals in criminal actions, and appeals are not allowed in criminal actions except "after convictions."

It is very clear to me that the sentence of the court for an act fully consummated, constituting a contempt, is based upon punishment solely for the *offense*. The fact that such offense is not ordinarily punished by the more familiar processes of the court,—upon information, warrant, or in-

dictment,—is not controlling, hardly persuasive. It is due to the necessity of the case that the offense is punishable summarily by the court in which it is committed, under that procedure which either at common law or by statute is applicable to the offense, (which happens to be *sui generis* in this respect), just as other offenses, either common law or statutory, are punishable according to the more formal procedure adapted to such offenses by other laws pertinent to them.

It is my opinion, therefore, that the present case, where it is understood the prisoner is serving a term upon the roads under a judgment pronounced against him for a contempt of the court because of an act already completed, is within the pardoning power of the Governor under the section of the Constitution above cited, and is, of course, subject to parole.

SUBJECT: DOUBLE OFFICE HOLDING; MEMBER STATE A. B. C. BOARD;
COUNCIL OF NORTH CAROLINA STATE BAR

7 June, 1938.

As requested by you, I have made an investigation of the question as to whether or not a Member of the Council of the North Carolina State Bar can serve at the same time as a member of the State ABC Board without violating Article XIV, Section 7, of the Constitution of North Carolina, forbidding double office holding, with certain exceptions.

This office has heretofore held that a member of the State ABC Board was holding an office within the meaning of the constitutional clause above referred to. Assuming the correctness of this conclusion, it remained only to decide as to a member of the Council of the State Bar. A consideration of the Act creating the State Bar, as amended, together with cases involving construction and application of the Act which have arisen since it was passed, leads to the conclusion that it would probably be held by our courts, if presented, that a member of the Council is holding an office within the meaning of the constitutional provision prohibiting double office holding and is not within the excepted class of officers. I may say, however, that the precise question has not been presented to our court, either as to a member of the State ABC Board or of the Council. My conclusion, therefore, is merely my prediction as to what the court would hold in these instances.

I am enclosing you a copy of the study of the question which was made in the office by Mr. Gregory, in which he states conclusions with which I agree. It may be of help to us if we send this to Mr. Feimster for his consideration and for such suggestions as he can make presenting the other view, if he is not in accord. I regret that my opinion could not be otherwise.

OPINIONS TO SECRETARY OF STATE

SUBJECT: CORPORATIONS; DELINQUENT TAXES; REVOCATION OF CHARTER;
REINSTATEMENT

5 August, 1936.

Upon report of the Commissioner of Revenue that a corporation is delinquent in the payment of State taxes, its charter or its permission to do business in this State is automatically revoked. There is a provision by which the corporation may be reinstated in this respect on payment of the tax. See current Revenue Act, sections 451, 452, and 453.

Obviously, neither the State of North Carolina nor the Commissioner of Revenue, nor the Secretary of State, were parties to the case in which the order of December 13, 1935, was made. There is nothing that can be done about the matter at present, and, in my opinion, the right of the corporation upon the reorganization or reinstatement here depends upon the payment of the tax.

SUBJECT: FOREIGN CORPORATIONS; DOING BUSINESS; ASSEMBLING OF BOILER

6 March, 1937.

You have referred to us letter dated March 2, 1937, from Messrs. Rountree & Rountree, in which they state that the Wickes Boiler Company,—a Michigan corporation,—has contracted to furnish and erect a boiler within this State. While this is not definitely stated as a fact, it is assumed that the foreign corporation will furnish its own employees in the erection of the boiler. The question involved is whether the foreign corporation is doing business in this State.

In my opinion, the Wickes Boiler Company is under no obligation to domesticate in this State. An incidental agreement to assemble a product or a structure that has been sold in interstate commerce does not destroy the nature of that commerce. *York Mfg. Co vs. Colley*, 247 U. S. 21. If, however, it can be seen that the installation of the machinery or structure is not a mere incident to the interstate contract but constitutes a distinct activity, then, the corporation would be considered as doing business within this State.

FOREIGN CORPORATIONS; INCREASE OF CAPITAL STOCK AFTER
DOMESTICATION, RE: UNITED ARTISTS CORPORATION

15 October, 1937.

C. S. 1181 requires that a foreign corporation doing business in this State shall file its charter or, in other words, as it is generally stated, domesticate. It also provides that for such domestication a fee of \$5.00 shall be charged for filing and an additional forty cents for every thousand dollars of capital stock, the fee, however, not to exceed \$500.00. Such a corporation may increase its capital stock and file with the Secretary of State a certificate showing such increase.

You inquire whether or not, when such an amendment to the charter or such increase of capital stock has been made in the State of incorporation,

in filing a certificate thereon in your office the foreign corporation is to be charged a further fee of forty cents per one thousand dollars upon such increase of capital stock.

The law does not expressly provide for a charge of this sort, and, for this reason, I cannot hold that such a charge would be valid. In my opinion, you must be content with the filing fee of \$5.00.

SUBJECT: COUNTY AGRICULTURAL SOCIETIES; INCORPORATION;
FILING OF CHARTERS

10 January, 1938.

You have referred to me the papers in connection with the Certificate of Incorporation of the Charlotte Agricultural Exposition, Incorporated, organized under C. S. 4941, et seq. You are tendered a fee of \$45.00 for recording the Certificate of Incorporation and requested to issue a certificate showing the organization of this corporation.

An examination of the statute contained in Michie's Code, Sections 4941 to 4948 inclusive, shows that there is no requirement in the law to file a certificate of incorporation with the Secretary of State and no duty charged to your office with regard to the receipt and filing of this certificate. The statute, Section 4941, says that any number of resident persons, not less than ten, may associate together in any county, under written articles of association, subscribed by the members thereof, and specifying the object of the association to encourage and promote agriculture, domestic manufactures, and the mechanic arts, under such name and style as they may choose, and thereby become a body corporate, with all the powers incident to such a body, etc.

The general law is that in the absence of a requirement by statute for the filing of incorporation papers such as is contained in the North Carolina statute, Chapter 28 Consolidated Statutes, it is not necessary that any filing of incorporation papers be done in order to organize the corporation. As no such requirement exists in this case, it is my opinion that it is not necessary to file this certificate in your office and that you are not authorized to receive it for filing.

SUBJECT: SECURITIES LAW; REGISTRATION BY NOTIFICATION

26 July, 1937.

The Dixie-Home Stores is a corporation formed by the consolidation of two other corporations theretofore doing business in this State and in South Carolina, domesticated in North Carolina. The business and the properties theretofore carried on and owned by the constituent corporations were carried on and owned by such corporations for more than three years prior to the consolidation, and each of the constituent corporations by reason of the business and property so carried on and owned were able to declare annually a dividend exceeding five per cent (5%) of the price at which the stock of the new corporation, The Dixie Home Stores, is being offered for sale.

The Capital Issues Law, C. S. 3924 (h), permits securities to be registered by notification, provided they are "securities issued by a corporation, partnership association, company, syndicate, or trust, owning property, business, or industry which has been in continuous operation not less than three

years and which has shown during a period of not less than two years nor more than five years next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings after deducting all prior charges, not including the charges upon securities to be retired out of the proceeds of sale, as follows:—(c) In the case of common stock not less than five percentum upon all outstanding common stock of equal rank, together with the amount of common stock then offered for sale, reckoned upon the price at which such stock is then offered for sale or sold.”

The Dixie-Home Stores is the owner of property and the operator of business meeting the foregoing definitions and requirements, but the question arises here as to whether the Dixie-Home Stores, being a new corporation, can be said as a matter of law, to have in legal effect, the advantage of former ownership.

I think this question is settled favorably to the contention of the Dixie-Home Stores by the reasoning in *Braak v. Hobbs*, 210 N. C. 379.

In that case, a consolidated corporation, technically, of course, an entirely new corporation, was held to be entitled to exercise all of the civil rights, both with respect to the properties held by it derived from the constituent corporations and with respect to the power of sale and like powers which had been given to one or the other of the constituent corporations.

The decision of the Court in effect recognizes a continuity of the life of the constituent corporations in the new corporation and is, I think, authority for the position that the Dixie-Home Stores with respect to the ownership of the property in question and the operation of the business, may be considered as merely continuing such ownership and operation by its constituent companies and, therefore, meets the requirements of the above quoted section.

SUBJECT: FOREIGN CORPORATIONS; DOMESTICATION

12 March, 1937.

You request an opinion upon the following facts:

A Delaware Corporation which was authorized to do business in the State of North Carolina decided to increase its authorized capital stock. A certificate of amendment was filed in Delaware on January 4, 1935. A copy of this certificate was mailed to the office of the Secretary of State of North Carolina on March 14, 1935. Section 1181 of Michie's Code was amended February 25, 1935, so as to increase the rate of excise tax on foreign corporations doing business in this State.

You inquire whether or not the increased capital stock of the Delaware Corporation should be taxed on the basis of the original statute or on the basis of the increased rate.

While the increase in capital stock was authorized by the Directors of the Corporation and the certificate of amendment was filed in Delaware prior to the amendment of the statute, the requisites for doing business in this State on an enlarged basis had not been complied with at the time the amendment took effect. The certificate of amendment was not filed with the Secretary of State until March 14, 1935,—fourteen days after the statute was amended. So far as the doing of business in this State is concerned, the increase in capital stock was subject to the provisions of the new law, it not having been authorized prior to this time.

OPINIONS TO STATE AUDITOR

SUBJECT: STATE BOARD OF PENSIONS; AUTHORITY OF AUDITOR AS
EXECUTIVE OF SUCH BOARD; C. S. 5168

2 February, 1937.

In the State laws governing the subject of pensions a State Board, consisting of the Governor, Attorney General, and Auditor, is created (C. S. 5168.a) and directed to make examinations of applications for pensions and, if necessary, take evidence concerning the same. The section creating the said Board provides that "such applications as are approved by the State Board shall be paid by the Treasurer upon the warrant of the Auditor."

C. S. 5168 (c) provides that after the correct list of pensioners is ascertained, the Auditor shall transmit the same to the Clerks of the Superior Courts of the several counties. Subsequent sections of the Consolidated Statutes, relating to pensions, provide generally a method by which application may be made to the County Board and the eligibility of the applicant determined. While it is not set up in these statutes, with all the precision which should be desired, that the determination of the eligibility by the County Board must receive final approval of the State Board, this is clearly indicated by reading all of the statutes together. I think this is the significance of C. S. 5168 (p).

I understand from your letter that the State Pension Board has met but seldom and the practice has been that the Auditor, perhaps acting as executive officer of the Board, has, as a matter of fact, been performing most of the duties required in connection with the administration of the pension laws.

I agree with you that a meeting of the Pension Board should be called, and that by proper rules and regulations such authority in this respect as the State Board may consistently with law delegate to the Auditor may be conferred upon him, so that his action on any matter might be taken without embarrassment.

SUBJECT: PENSION ROLL; WIDOW OF HOME GUARD MEMBER

1 March, 1937.

I regret to say that I know of no way by which the widow of a member of the Home Guard can be placed upon the pension roll without a change in the law, that is, an act of the General Assembly.

C. S. 5168 (j) provides for a pension "to the widow of any deceased officer, soldier, or sailor who was in the service of the Confederate States of America during the war between the states." A member of the Home Guard, however honorable and necessary his service, has never been classed as a soldier "in the service of the Confederate States."

In saying this, I assure you that I am fully aware of the great service done by the members of the Home Guard during the Civil War, stories of whose loyalty and bravery I heard in the period of my childhood following the Civil War; and I can confirm Mr. Bowie's statement that these old men performed a very necessary service and that they "suffered severely from marauders and bushwhackers." I still know a spot in the county where I

was born where a company of these old men, members of the Home Guard, were set upon at night and one of them killed.

Nevertheless, this does not change the law, although it may give a reason for the enactment of a new one.

SUBJECT: STATE WAREHOUSE SYSTEM; FUND FOR PROTECTION OF THOSE
DEALING WITH LICENSED WAREHOUSEMEN

10 April, 1937.

You have referred to me for consideration voucher in favor of Commodity Credit Corporation in the sum of \$45,000.00, to be paid out of the fund established by Chapter 137 Public Laws 1921, (See C. S. 4925. e), in connection with the State Cotton Warehouse System. The question is as to the duty of the Auditor with respect to drawing a warrant upon this voucher.

In this connection, I wish to say that the fund to which I have referred is set up for the protection of those dealing with licensed warehousemen of the State Warehouse System. Bonds are taken from these licensed warehousemen, and, upon a reading of the statute and also the opinions of the Supreme Court upon the subject, it will be found that these warehousemen themselves, and the bonds which they have given, are primarily liable for losses sustained by depositors of cotton and holders of negotiable receipts given therefor.

While it is ordinarily probably the better practice to have this liability settled by those who have sustained the loss, it is, nevertheless, competent, upon a satisfactory showing of fact, for the Treasurer to pay such losses and subsequently sue the warehouseman and the sureties on his bond for indemnity and reimbursement.

Of course, the Attorney General can but advise on the legal aspects of the matter. The final decision rests with the authorities who have the dispensing of the fund and the management of the Warehouse System.

Upon a similar smaller claim, apparently fully covered by the bonds, it seemed more desirable that the State should pay it and proceed against the surety company,—inasmuch as the liability was inevitable,—than it was to go through a process of litigation. In that case payment was clearly within the liability of the warehousemen's bond and, in fact, as I understand it, within the amount which the bonding company was willing to pay in discharge of their liability. I assume the advice given in that particular matter has been acted on by the Department in this smaller claim.

While the amount is large, I assume that the Department has thoroughly examined the situation, is satisfied with all the facts necessary to support the claim, and prefers to pay it rather than to have litigation.

As I have said, there is a question of fact presented which it is competent for those handling the fund to settle, and they have an option undoubtedly in my opinion to pay off the liability in the first instance and resort to the bond afterward. Upon such determination, the voucher is a proper one from a legal aspect.

SUBJECT: CHAPTER 318, PUBLIC LAWS OF 1937; INTERPRETATION OF
THE TERM "TOTALLY HELPLESS"

5 October, 1937.

I agree with you that in order to be placed on the pension roll in "Class A," the widow of a Confederate Soldier does not have to be completely bedridden in order to come within the meaning of the term "totally helpless." Even in matters construed as strictly as life and accident insurance policies, total disability has never gone that far. I think it would be sufficient if the woman is not able to take care of herself in the ordinary way without the help and assistance of some other person. That is to say, that she cannot perform for herself the ordinary things which one is expected to do without help, although she may not be in such condition as to be practically unable to move or get about.

SUBJECT: BUREAU OF INVESTIGATION AND IDENTIFICATION; BENEFITS TO
DEPENDENTS OF OFFICERS KILLED OR INCAPACITATED IN DISCHARGE OF
DUTY; CHAPTER 349, PUBLIC LAWS 1937

3 February, 1938.

Chapter 349, Public Laws of 1937, Section 9, provides that the funds collected under this law shall be divided into two equal parts, one of which shall be set up in a special fund to be known as "The law enforcement officers benefit fund," and that this fund shall be used to aid the dependents of law enforcement officers killed or seriously incapacitated while in the discharge of duty.

In my opinion, those only are eligible to participate in this fund (a) who are dependents of officers killed in the discharge of their duty, and (b) such officers as are seriously incapacitated.

It might appear that a direct payment could be made to the dependents of those officers who are merely seriously incapacitated and not to the officers themselves. While, however, the law in terms states that such dependents may be thus aided, in my opinion while the officer himself is living and capable of attending to his affairs this dependent aid should come through such officer.

I will say, however, that minor points of this character may be fully covered by such rules and regulations as the committee appointed by the Governor, with the said officer as an ex officio member, have the right to establish and promulgate under this section.

SUBJECT: CHAPTER 349, PUBLIC LAWS OF 1937; LAW ENFORCEMENT
OFFICERS; COURT COSTS

8 March, 1938.

This office has formerly ruled that the One Dollar additional court cost should be collected in Mayors' Courts, regardless of the fact that Mayors have the same jurisdiction as a Justice of the Peace.

SUBJECT: SALARIES AND FEES; RESOLUTION 41; PER DIEM AND EXPENSES
OF MEMBERS OF COMMISSIONS

28 June, 1938.

We have examined Section 3 of Resolution 41 relative to compensation of

the members of the Commission who have been appointed by the Governor to study the feasibility of providing a retirement system for the teachers in the public schools of the State.

This section provides that members of the Commission shall receive compensation at the rate of \$10.00 per day for the actual number of days they are in session. The expenses of this Commission are limited to \$1,500 a year. No provision is made in the Resolution for the payment of mileage and the expenses of the Commission while they are engaged in the duties prescribed in the Resolution.

In the absence of any provision in the Resolution, we are of the opinion that the last paragraph of Section 6 of the Appropriation Act, Chapter 99, Public Laws of 1937, is applicable and that members of the Commission shall be paid five cents per mile for traveling, going and returning and necessary traveling expenses.

OPINIONS TO STATE TREASURER

SUBJECT: STATE SINKING FUND; PAYMENT OF INTEREST ON COUNTY
ROAD BONDS

15 December, 1936.

In your letter of December 7, you inquire whether or not part of the Jones County funds, which are being held in the State sinking fund, can be applied for payment of the interest on the balance outstanding of an original issue for road purposes.

Chapter 44, Public Local Laws of 1929 authorized the issuance by Jones County of \$425,000 worth of bonds for the purpose "of raising funds with which to defray the cost of building and rebuilding public roads and bridges in said county." Section 5 of said Act authorized that payments from the State under contract made between the Highway Commission and Jones County may be applied in payment of the bonds.

In my opinion the funds due the county may be used for this purpose. In Section 13 of Chapter 95, Public Laws of 1927, there is a provision that if funds due a county by the State Highway Commission have already been pledged by the county to the payment of an indebtedness said funds shall be placed in the State Sinking Fund Commission, there to be held and used "solely for the purchase or payment of such county indebtedness at or before maturity "thereof". As interest on a lawful obligation constitutes a part of the counties indebtedness, I can see nothing to prevent moneys being taken from the Sinking Fund to pay past due interest.

SUBJECT: SALARIES; CONSTITUTIONAL OFFICERS; STATE TREASURER

20 January, 1937.

The Constitution of North Carolina provides that compensation of certain constitutional officers shall not be increased nor diminished "during the time for which they have been elected". Constitution, Article III, Section 15. As "the time for which they shall have been elected" in the particular case of State Treasurer begins with January 1, 1937, and the statute increasing the salary of the Treasurer provides simply that his salary is fixed at \$6,000.00 (Chapter 249, Public Laws 1935), and by Section 3 went into effect December 31, 1936, it is my opinion that the Treasurer is entitled to receive his salary at the rate of \$6,000.00 annually from and after January 1, 1937, notwithstanding the fact that he had not yet qualified by taking the oath and that for the few days from January 1st to January 7th he was acting as a "hold-over" officer. In other words, in my opinion, it is the proper construction to put upon the Constitution and the statute together that his increase of salary begins on the day of the "time" for which he was elected.

SUBJECT: STATE IMPROVEMENT BONDS AND PERMANENT IMPROVEMENT
BONDS, ISSUED UNDER AUTHORITY OF CHAPTER 102, PUBLIC LAWS 1913

14 June, 1937.

You have requested me to give an opinion on the legality and validity of certain bonds issued under authority of Chapter 102, Public Laws 1913, for

various purposes mentioned in the Act, including appropriations for permanent improvements to the several State Institutions mentioned in the Act,—the Supreme Court Building, the State Hospitals, the University of North Carolina, and various other educational and charitable institutions.

Under the aforesaid law, bonds were authorized to be issued totaling \$1,142,500.00, in denominations of \$500.00 and \$1,000.00 each, bearing date of July 1, 1913, and maturing forty years after date.

Under this authority there have been issued bonds bearing serial numbers as to the \$1,000.00 denomination of 1 to 800, and, as to the \$500.00 denomination, 1 to 685.

Certain registered bonds issued under authority of this Act were exchanged for other bonds under authority of the general State law controlling such exchange. Amongst those which I now list by original number and the present corresponding number, respectively, are:

<i>Original Bond Numbers</i>	<i>Present Bond Numbers</i>
139	259
138	258
159	50
144	237
140	260

The bonds issued of date August 27, 1931, are printed as State Improvement Bonds and not Permanent Improvement Bonds. They are, however, issued under the same authority and such designation is immaterial.

I have carefully examined Chapter 102 of the Public Laws of 1913, under which these bonds were issued, with respect to its validity and constitutionality. An examination of the Senate and House Journals of 1913 discloses that the Act was passed by the Legislature in accordance with constitutional requirements and is a valid enactment and lawful authority for the issuance of the bonds.

The bonds which I have referred to are in form and substance as required in the said act and were issued in due accordance therewith and are valid obligations of the State of North Carolina.

SUBJECT: (a) RESPONSIBILITY FOR TAX ON STATE-PURCHASED BUILDING SITE; (b) AUTHORITY FOR SALE OF BUILDINGS NOW ON SITE

2 July, 1937.

(a) State v. Fibre Company, 204 N. C., 295, decided that where real estate was bought by the State between April 1 and July 1 of any year, no liability for the tax arose until the beginning of the fiscal year, that is, July 1, *and the lien for the taxes did not attach until the first Monday in October, when they were due.*

In order to correct this and provide that there should be no escape from the payment of taxes during the interim between April 1 and July 1, the Legislature of 1937, in Section 1401 of the Machinery Act, provides that the lien for the taxes shall attach on April 1st.

The lien of the taxes so attaching constitutes an encumbrance on the title, and it is incumbent upon the owner of the property at that time to clear off this encumbrance. In other words, the seller of the property must pay the tax.

(b) Nothing else appearing, it would be the duty of the Building Commission to put the building site in condition for the construction of the building provided for in Chapter 365, Public Laws 1937. However, as this involves sale of material, I refer you to C. S. 7502 (c) (e), which, I think covers the question, and I think it would be your duty to take the matter up with the Division of Purchase and Contract cooperatively, and request the sale of the buildings now on the site by the Director of Purchase and Contract.

SUBJECT: COLLECTION OF INTEREST ON DEPOSITS IN BANKS; MEMBERS OF
FED. RESERVE SYSTEM

15 July, 1937.

Under Title 3, Section 19, of the National Banking Act of 1935, the State is permitted to collect interest on deposits in banks which are members of the Federal Reserve System, down to August 23, 1937, after which date the exception in favor of the State in that respect expires by limitation, and, under the section itself, no more interest can be charged on deposits in such member banks where the deposit is on demand.

SUBJECT: UNEMPLOYMENT COMPENSATION CHECKS; CUSTODY OF VOUCHERS

22 February, 1938.

The Unemployment Compensation Act of 1936, Chapter 1, Public Laws of 1936, provides a method of collecting, clearing, and disbursing the unemployment compensation funds created under that law. See Section 9. Subsection 9 (a) creates the fund and provides that it shall be kept separate and apart from other public funds, providing, however, that it shall be administered by the Commission.

Subsection 9 (b) provides that the State Treasurer shall have the custody of this fund and that he "shall disburse such fund in accordance with the directions of the Commission and in accordance with such regulations as the Commission shall prescribe."

This subsection provides for the three accounts which shall be kept by the State Treasurer, to-wit, (1) a clearing account, (2) an unemployment trust fund account, and (3) a benefit account. We are here especially concerned with withdrawals from the benefit account.

The method of withdrawal is set out in subsection 9 (c). It is therein provided that the Commission shall "requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period." Further "upon receipt thereof the Treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon by the State Auditor requisitioned by the Commission for the payment of benefits solely from such benefit account." It is further provided that "all warrants issued upon the Treasurer for the payment of benefits and refunds shall bear the signature of the State Auditor, as requisitioned by a member of the Commission or its duly authorized agent for that purpose."

It follows from the foregoing that a general warrant is drawn upon the treasury, under which an amount is requisitioned and set apart from the fund covering the total of the amount of benefits necessary to be paid for

a reasonable time thereafter; and representing the same money, there are a great many small warrants drawn upon the fund so set apart to total but not exceed the warrant representing the original requisition by the Commission for the money with which to pay these smaller vouchers.

The system is rather unique in that the Auditor is compelled not only to draw a warrant upon the treasury for the fund paying the benefits awarded, but must also sign the warrant for the individual items.

You inquire whether or not the Treasurer may surrender into the possession and custody of the Unemployment Compensation Commission the vouchers drawn for the individual payment of benefits, retaining only the warrant drawn upon the treasury upon the original requisition.

Since a complete record is kept of the payments of the individual items, in my opinion it will be safe and legitimate practice to return these individual vouchers to the Unemployment Compensation Commission for its custody. I am convinced that the retention of these items is not required under the Act or by principles of safe accountancy, and to do so would entail great inconvenience and expense on your office.

OPINIONS TO STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

SUBJECT: SCHOOL LAW; SELECTION OF TEACHER OR PRINCIPAL; DUTY OF LOCAL SCHOOL COMMITTEE

15 August, 1936.

Answering your letter received today on the above subject, I understand the following condition exists with reference to Swan Quarter High School:

The School Committee elected Mr. F. F. Taylor as Principal of the local high school. The County Superintendent and the County School Board refused to approve his election. Several weeks have passed and no action has been taken by the School Committee to elect a person to succeed Mr. Taylor.

If you will permit me to add further detail which I gathered from the interview on this subject, I will say that I understand that after the County Superintendent and the County Board of Education declined to approve of Mr. Taylor's election as Principal, notice thereof was received by the Local Committee and the latter undertook to re-elect Mr. Taylor. The action of the Superintendent and County Board of Education thereon was a further rejection or disapproval of which the committee had notice.

After a teacher or principal is elected by the local school committee and fails of approval by the Superintendent or the County Board of Education, the person so rejected is not eligible to re-election by the School Committee, and an attempt to do so might be considered in passing upon the question of whether or not the members of the committee were properly discharging the duties of their offices.

I do not think any power rests in the County Board of Education to discharge a committee as a whole, but that Board does have the power, upon complaint properly made, to deal with the individual member of the committee for unfitness to hold his position, misconduct in office, or a failure to perform the duties thereof.

Under the development of our school law to its present position, the most important duty resting upon the local school committee is the election of a teacher. Such election made in the proper manner and at the proper time is, of course, essential to the maintenance and conduct of the schools. Intelligent and sincere cooperation with all those having any duty to perform with regard to the selection of a teacher is expected by the law.

In my judgment, if the several members of the local school committee either deliberately or through neglect fail to discharge the duty of election of a teacher, such members individually, upon proper complaint, may be removed from office and the vacancy filled as provided by law.

SUBJECT: SCHOOL LAW; FINES, FORFEITURES AND DOG TAXES;
CAPITAL OUTLAY

5 November, 1936.

I understand from letter of Mr. L. B. Pendergraph, Superintendent of Mount Airy Public Schools, which accompanies your inquiry of November 4, that recently the County Commissioners with federal aid constructed an addition to one of the school buildings in the Mount Airy Administrative Unit. The county paid \$7,500.00 on this building.

Now, Mr. Pendergraph has received notice from the County Auditor that no more fines, forfeitures, poll taxes and dog taxes, will be paid to the Mount Airy Administrative Unit until the county has been reimbursed out of such funds for the \$7,500.00 spent upon the school building.

You inquire whether or not this can be done under the law.

The answer is "no." The duty of building a school building in the Mount Airy City Administrative Unit, when necessary, was, under the law, resting upon the Board of County Commissioners, its action to be based on the application of the County Board of Education. It so happens that now, since no authority is given to any school unit to spend any money or incur any debt for such purpose, the County Commissioners have the sole responsibility for erecting such buildings, and this they must do under Article IX, Section 3 of the State Constitution.

As for the funds you mentioned, that is, fines, forfeitures, poll taxes and dog taxes, these funds are expressly allocated by the School Machinery Act of 1933, as well as the School Machinery Act of 1935, to the objects of maintenance of plant and fixed charges; except that when necessity is shown, the State School Commission may approve the use of such funds in any administrative unit to supplement any object or item of the *current expense budget*. Chapter 445, Public Laws of 1935, Section 9.

There is no authority of law for the withholding of proceeds from fines, forfeitures, poll taxes and dog taxes, from the Mount Airy City Administrative Unit and applying them to reimburse the county for its expenditures of \$7,500. on a school building in that district.

SUBJECT: CONSTITUTIONAL AMENDMENT INVOLVING DEBT LIMITATIONS OF STATE, CITIES AND COUNTIES; LOANS FROM THE STATE LITERARY FUND

27 November, 1936.

Some delay has been necessary in answering your letter of November 9, incident to a study of the questions presented in your letter. The first question presented by you is as follows:

"1. Is the authority of the State Board of Education to make loans to counties from the State Literary Fund subject to the provisions of the Debt Limitation Amendment?"

In my opinion, loans to counties from the State Literary Fund are subject to the provisions of the Debt Limitation Amendment. In the case of *Brockenbrough vs. Board of Commissioners*, 134 N. C., 1, it was held by our court that "debt" as used in Article VII, Section 7 of the Constitution, means a general obligation by the terms of which the credit of the municipality is pledged. This decision is incurred with those from other States. See: *Alabama State Bridge Co. vs. Smith* (Ala.) 116 So. 695, *Bates vs. State Bridge Comm.* (W. Va.) 153 S. E. 305; *Scarle vs. Haytum*, (Colo.) 271 Pac. 629; *Klein vs. Louisville*, (Ky.) 6 S. W., 1104. From this I would conclude that the court, when it comes to consider this word as employed in the Debt Limitation Amendment, will give it the same construction.

The question would then arise as to whether loans from the Literary and Special Building Funds constitute general obligations of the county or municipality. It has been suggested that the obligation might be upon the school district to which the money ultimately went rather than upon the county. A study of the statutes under which these funds were created in-

icates that, while the special district is liable to the county for the amount expended within its borders, the county is directly responsible to the State. The procedure outlined in the statute for a loan from the Literary Fund is as follows:

C. S. 5683. State Board of Education may loan money to the *County Board of Education* for purpose of erecting schools.

C. S. 5684 outlines terms of loans, installments, interest, etc.

C. S. 5685. Payments are made by County Board of Education out of county school funds. The loan constitutes a lien upon any such funds, and, in case these are insufficient, the State Board of Education may force the tax collector to keep all taxes collected for school purposes and apply them in payment of the loan.

C. S. 5686. The County Board of Education may loan the fund to such of the special districts as have already imposed a sufficient tax rate to cover payment.

It seems to me that a study of these Sections shows that, while the general taxing power of a county is not pledged to the payment of these loans, it does constitute a general obligation of the county. Under the terms of the statute, all of the taxes collected for school purposes, with the exception of those imposed for the purpose of paying bonds already issued, are pledged to the payment of these loans. It is my opinion that this is sufficient to constitute them debts.

The loans made under authority of the act creating a Special Building Fund are essentially the same in character as those under the Literary Fund, except that in the former the county is required to impose a special tax for the purpose of meeting payment. C. S. 5692.

Your second question apparently need not be answered now as the amendment has already been certified and is now a part of the Constitution.

Your third question is as follows:

"3. May the State Board of Education continue to make loans from the State Literary Fund to counties after November 24, provided the amount of the loan is within the limitation set by the Constitutional Amendment—that is, two-thirds of the amount, the indebtedness of the county, was decreased during the next preceding fiscal year?"

This question should be answered in the affirmative.

Your fourth question is as follows:

"4. Who is the proper county official to certify to the State Board of Education, or to bond buyers, the amount that the county or municipality has reduced its indebtedness during the fiscal year next preceding?"

The proper county official to make the certificate would be the County Auditor in those counties in which the county has a County Auditor. In those counties in which there is no County Auditor, the certificate should be made by the Chairman of the Board of County Commissioners and the County Treasurer. Certified copies of minutes of the proceedings of the Board of Commissioners authorizing the loans should in all cases be certified by the Clerk of the Board and the Chairman of the Board.

Your fifth question is as follows:

"5. As you know, it is now the obligation of the several counties of the State to construct school buildings in the city administrative units, in the county administrative districts and in the special taxing districts. In planning future loans, may the county authorities take into consideration the reduction in indebtedness in all of these units during the year next preceded-

ing? If not, may it take into consideration the amount by which the school debt has been reduced in these three units?"

Under the provisions of the Debt Limitation Amendment, in my opinion, the county borrowing the money can consider only the total indebtedness of the county reduced in the preceding year. If the county has assumed the debts of special districts, these debts so assumed would be considered as a part of debts reduced in the preceding year to the extent to which they were retired during that year. Unless the debts had been assumed by the county retirements by the units would not be taken or considered as a part of the debts reduced by the county during the preceding year.

SUBJECT: SCHOOL CHILDREN; COMPULSORY VACCINATION; HEALTH LAWS

7 December, 1936.

You inquire, "Would a County Health Officer have authority to exclude children from school who are not vaccinated?" It would appear that the question must be answered in the affirmative. C. S. 7162 provides:

"... The board of health of any town, city or county shall have authority to require children attending the public schools to present certificate of immunity from smallpox either through a recent vaccination or previous attack of the disease. . . ." Violation is penalized by fine of parents.

Hutchins vs. School Committee, 137 N. C. 68.

The rule of this case is where a school board has entire and exclusive control of the public schools, they may require vaccination as a prerequisite to attendance. It is true that an epidemic prevailed in the city at the time, but the case is not based on that fact. The power of the committee to make this vaccination was not brought under any legislative authority as to compulsory vaccination, but simply under the charter provision giving the committee full control of schools in general terms.

The Supreme Court of the United States has ruled upon the question of the validity of a city ordinance requiring children to be vaccinated as a prerequisite to attending school:

Zucht vs. King, 43 S. Ct. 24 (1924). Justice Brandeis said: "Ordinances of the City of San Antonio, Texas, provide that *no child* or other person *shall attend a public school* or other place of education without having first presented a *certificate of vaccination*. . . . The bill charges that there was no occasion for requiring the vaccination; that, the ordinances deprived plaintiff of her liberty without due process of law, by, in effect, making vaccination compulsory; and, also, that they are void, because they leave to the board of health discretion to determine when and under what circumstances the requirement shall be enforced, without providing any rule by which that board is to be guided in its action, and without providing any safeguards against partiality and oppression."

Plaintiff prayed for injunction against enforcement of the ordinances; mandamus to compel her admission to public school, and damages. The bill was dismissed, and the United States Supreme Court dismissed the writ of error, purely on the ground that "it is within the police power of a state to provide for compulsory vaccination." Brandeis said: "These ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health."

State vs. Hay, 126 N. C. 999. This case holds that it is within

the police power for the Legislature to authorize the cities and counties to make vaccination of all inhabitants of the town compulsory.

Two New York cases are illuminating in this connection. The first holds that the statute excluding children from school until they are vaccinated is within the police power, and that it does not violate that provision of the Constitution providing for free schools. Also, that it takes away no constitutional rights, privileges and liberties.

The second case holds that not only is such a law valid, but that "a father who did not believe in vaccination could not refuse to have his child vaccinated, and then plead the vaccination rule as a defense to a prosecution" for violating the compulsory school attendance laws. (*Viemeister vs. White*, 72 N. E. 97, N. Y.; *People vs. Ekerold*, 105 N. E. 670, N. Y.)

For other cases in full accord with the United States and the New York rule, supra, see: *State vs. Martin*, 204 S. W. 622, (Ark.); *People vs. City Lansing*, 195 N. W. 95, (Mich.); *New Braunfels vs. Waldschmitds*, 207 S. W. 303, (Tex.).

From the foregoing, it appears that ordinances and statutes requiring vaccination as a condition precedent to school attendance are valid. Our Court has held that school committees or boards of education may make such regulations.

SUBJECT: SCHOOL LAW; ATTENDANCE OF INDIANS AT WHITE SCHOOLS

2 February, 1937.

With the exception of the Croatan Indians of Richmond, Robeson, and Sampson Counties, and their descendants, Indians are not prohibited from attending schools for the white race. See C. S. 5384.

SUBJECT: SCHOOL MACHINERY ACT OF 1937; APPLICATION OF TEACHERS FOR RE-ELECTION; NOTICE OF ELECTION OR REJECTION

10 April, 1937.

In my opinion, the new school law relating to the application of teachers for re-election and the notification in case of failure to elect, (School Machinery Act of 1937, Section 12, second paragraph) does not have the effect of repealing an election or rejection within thirty days after the application, nor does it have the effect of requiring the County Superintendent or administrative head to notify the applicant of election or rejection within a period of thirty days from the application.

The paragraph referred to reads as follows:

"Any teacher or principal desiring election or re-election to a position in the State School System shall file his or her application in writing with the County Superintendent of Instruction or the head of the administrative unit. It shall be the duty of such County Superintendent or administrative head to notify applicant of election or rejection within a period of thirty days."

While it must be conceded that the paragraph is ambiguous, I cannot conclude that it was the intention of the law by the mere application of the person desiring to teach that the ordinary process of selection or rejection could be so controlled by the date of such application, which is at the

will of the applicant, as to require that both election or rejection, and notice thereof, should be made within the thirty day period following such application. In my judgment, the law has been complied with when the notice has been given within thirty days after the election or rejection.

SUBJECT: SCHOOL LAW; VOCATIONAL TRAINING

28 May, 1937.

I have before me your inquiry based upon letter of Mr. L. H. Barbour, County Superintendent of the Durham Schools, of date May 20, 1937, relating to the above subject.

I am firmly convinced that the teaching of music and art, and more particularly an appreciation of those subjects, is extremely important to the cultural life of our people and ought to be included in any curriculum provided for education at public expense.

The General Assembly, however, does not seem to have gone that far and is given authority only for the support out of taxation of vocational training as defined and described in the School Machinery Act, to the support of which the Federal Government contributes. This does not include music and art.

SUBJECT: SPECIAL SCHOOL ELECTION; HOURS OF VOTING

1 June, 1937.

The question has arisen as to what hours the polls should be kept open for a special school tax election. House Bill No. 43 relating to the hours of voting, provides:

"Section 33. Hours of Election. In all primaries (and in all municipal and local elections in this State, polls shall be open between the hours of seven a. m. and seven p. m. Eastern Standard Time; provided, that no polls shall remain open after sunset. (Provided further, that in all highway and general elections the polls shall be open from sunrise until sunset)."

My interpretation of this law is that it would require a special school tax election to follow the provisions above quoted, that is to say, the polls should be kept open between the hours of seven a. m. and seven p. m. Provided, however, that the polls should not be open after sunset.

SUBJECT: COUNTIES; APPROPRIATION FOR LIBRARY

8 July, 1937.

C. S. 2702 authorizes the county to appropriate funds for maintaining the library owned by another organization. The authority conferred by this statute is amply sufficient to justify the County Commissioners of Pitt County in appropriating money toward the support of municipal libraries at Greenville and Farmville.

SUBJECT: EDUCATION; TEACHERS' HEALTH CERTIFICATE

23 July, 1937.

Chapter 136, Section 159, Public Laws of 1923,—C. S. 5556,—requires that teachers must receive a health certificate from "the county physician,

or other reputable physician of the county, certifying that the said person has not an open or active infectious state of tuberculosis, or any other contagious disease." Upon the inquiry of Mr. R. H. Latham, Superintendent of the City Schools of Asheville, N. C., you ask whether or not it is competent for the "School Board" to require teachers in the Asheville City Schools to receive their health certificates from the Health Department.

The answer is "no." The School Board has no authority to modify or restrict the application of law or limit the source of the certificate to the City Health Department. The presentation of a certificate from the county physician, or other reputable physician of the county, ends the matter so far as this part of the teacher's qualification is concerned.

SUBJECT: SCHOOL LAW; RIGHT TO ATTEND PUBLIC SCHOOLS

27 August, 1937.

If the home owner and resident of Winston-Salem has the custody of the person of a niece, whose parents live in another State but, nevertheless, the resident of this State is caring for the child and is in loco parentis, the school authorities of the district in which he resides will be compelled to accept such child for tuition. In my judgment, this also applies to the ninth month run upon supplements.

SUBJECT: SCHOOL LAW; ENTRANCE TO PUBLIC SCHOOL; AGE LIMIT

15 September, 1937.

Your inquiry upon the letter of Mr. John C. Hadley presents the question as to whether or not a child who has been permitted to enter a school of another state, although his sixth birthday comes after October 1, may be transferred to a North Carolina public school after his sixth birthday has been passed without conflict with the North Carolina public statute provided in such case, which requires that a child to be entitled to enrollment in the public schools for the school year must be six years of age on or before October 1st of the year in which it is enrolled and must enroll during the first month of the school year. School Machinery Act, Chapter 394 Public Laws of 1937, Section 22½.

In my judgment, such a child could not legally enter the public schools of North Carolina during the current school year in which the sixth birthday of the child came after October 1st and I must answer your inquiry no.

SUBJECT: SCHOOL LAW; COUNTY BOARD OF EDUCATION; POWER TO REQUIRE

ATTENDANCE IN PARTICULAR DISTRICT; ENFORCEMENT OF REQUIREMENT

29 September, 1937.

In the letter of Mr. J. S. Blair, Superintendent Bladen County Schools, dated September 18, 1937, (which you enclosed in your letter of September 20th), it is stated that the Board of Education instructed its Secretary to write the principals of the various schools, requesting them not to allow any elementary children living in one district to be enrolled in the schools of another district. It is stated that the Secretary was instructed to notify all principals that those violating this request would not have their contracts approved for the 1938-1939 school term. The question is asked

whether or not the County Board of Education has authority to make such regulations.

The allocation of pupils to the schools in the several districts seems to have been made a matter of statutory requirement rather than of authority or discretion on the part of the County Board of Education. In this connection read C. S. 5661, which is intended to give resident children all the benefits of the schools of the district, and C. S. 5662, which provides that under certain circumstances it is permissible for non-resident children to attend the schools of the district upon payment of tuition fees, and C. S. 5481, which provides that if school facilities for all the children in a given district are not adequate, the County Board of Education may authorize the transfer of these children to another district. C. S. 5481 thus seems, in a measure, to limit the action of the County Board of Education in the premises to the instances where school facilities in a particular district are not adequate.

C. S. 5430 and 5461, giving to the County Board of Education, general supervision and control of all matters pertaining to public schools, does not, in my opinion, give the County Board of Education a discretion as to who may or may not attend these schools.

There is a larger question to be observed here in which it is necessary for the local Boards of Education to cooperate with the School Commission, if we are to have any successful administration of the school law. The School Commission, in cooperation with the County Boards of Education, is required to make school bus routings, and the School Commission is in general charge of the matter of transportation. School Machinery Act, Sections 24 and 25. Also, within certain limits, the School Commission has the allotment of the proper number of teachers to each school, and this question is closely connected with the subject of your inquiry.

Considering these interlocking and related duties of the School Commission and of the County Boards of Education, I am of the opinion that the County Boards of Education must perform their duties in relation to the major importance of the requirements and powers of the School Commission aforesaid.

Of course, the law,—C. S. 5641,—provides that in case a principal violates a rule or regulation prescribed by the Board of Education, the Board may, in its discretion, reduce his salary or discharge him.

I think, if no other provision has been made for attendance of non-resident children in the public schools of a district, the Board of Education might require of the principal that he confine the enrollment to resident children.

SUBJECT: SCHOOL LAW; SCHOOL DISTRICT FORMED OF PORTIONS OF CONTIGUOUS COUNTIES; AUTHORITY OF COUNTY BOARD OF EDUCATION

30 September, 1937.

Since the Chowan County case,—*Elliott v. Board of Equalization*, 203 N. C., 749,—and in consequence thereof, the Legislature took the power of creating school districts away from the County Boards of Education and gave that authority to the School Commission. See School Machinery Act 1935-1937. In my opinion, the County Boards of Education have no further authority or duties with respect to the forming of these districts.

An examination of Section 4 of the School Machinery Act of 1937 convinces me that the authority of the School Commission, with reference to districts formed of portions of contiguous counties, is confined to perpetuation of such existing districts.

SUBJECT: SCHOOL MACHINERY ACT OF 1937; PER CAPITA APPORTIONMENT OF COUNTY-WIDE FUNDS

19 October, 1937

I have your letter of September 27th, in which you write as follows:

"It is my understanding that Section 15 of the 1937 School Machinery Act contemplates that all county-wide current expense school funds shall be apportioned to county and city administrative units, and distributed monthly on a per capita enrollment basis. In one or two instances local school authorities have raised the question as to whether funds used by the county under the item of General Control should not be deducted before the per capita distribution is made. I should like to submit the following question:

"Does not Section 15 contemplate that all funds for current expense purposes shall be distributed on a per capita enrollment basis, including funds used for General Control?"

In the last paragraph in subsection (c) of Section 15 of the School Machinery Act of 1937, it is provided as follows:

"All county-wide *current expense* school funds shall be apportioned to county and city administrative units and distributed monthly on a per capita enrollment basis."

County-wide capital outlay funds are distributed on the basis of approved budgets. All county-wide debt service funds are distributed on a per capita basis based upon enrollment for the preceding year, not in excess of requirements of the unit.

Under Section 9 of the School Machinery Act of 1937, the objects of expenditure under the heading of General Control, as well as other objects mentioned in the list set out in this section, are to be provided from State funds. In case any county-wide funds are used to supplement the objects of expenditure listed under General Control, with the approval of the State School Commission as authorized in the last paragraph of Section 9, such expenditures of county-wide funds would be a part of the current expense of operating the schools in the unit. As a part of the current expense school funds of the unit, the amount expended for this purpose of county-wide funds must be apportioned to the county and city administrative units as required by the above quoted part of Section 15.

In my opinion, the whole procedure should be simplified by an apportionment of all county-wide current expense funds on the basis as provided in the statute.

SUBJECT: SCHOOL LAW; SCHOOL ATTENDANCE; RE-ENTRY AFTER FINAL CERTIFICATE

20 October, 1937.

There are two questions in your letter of October 19th raised by the letter of Mr. Mills. Both questions in Mr. Mills' letter, however, I think may be answered together.

The law provides that children of the State between the ages of six and

twenty-one shall receive instruction in the public schools. Of course, the Constitution does not provide details of procedure by which such training may be given to the child. There are numerous statute laws, of course, dealing with the subject, and going into the setup of the schools with some particularity.

I can find no law, however, which deprives the various authorities dealing with the schools of a certain amount of discretion which they must necessarily exercise in establishing the number of grades and subjects to be taught therein.

We use the term "graduated" in reference to a student of the high schools who have finished courses prescribed for such student, has shown proficiency, and has received a certificate which recognizes that the pupil has received the requisite amount or number of credits.

Quite possibly many very important subjects may be added to the curriculum after such pupil has been given such a certificate, which it would be very desirable to include in the training given that pupil. It is possible, too, that further and more extensive training might be afforded by the addition of grades not theretofore taught in the school.

I do not think that a pupil could lawfully insist upon "going to school" every year from six to twenty-one. We recognize here a discretion on the part of the school authorities to limit both as to time and subject the training which the State can afford to give. We recognize the existence of a necessary discretion here, and I think we must also recognize the same discretion as applied to the subject with which we are here dealing, to-wit, the return of a pupil to school after having received the certificate to which we have referred. In my opinion, in the exercise of such a discretion, the school authorities have the right to admit for further training any pupil who has passed through the several grades established, studied the subjects then required or permitted, and received such a certificate of credit, when new subjects or new grades have been added, or when, in the discretion of such authorities, the pupil might profit from study of other subjects already established but not included in the course taken.

Of course, sound judgment and discretion must be exercised, and whatever is done in the matter should be upon general terms or rules fully established, applicable to all similar situations.

SUBJECT: SCHOOL LAW; JOINT SCHOOLS; POWERS OF BOARD

20 October, 1937.

In your letter of October 19th you refer to a number of consolidation problems in the State, involving construction of schoolhouses to serve joint districts or, rather, a district composed of parts of contiguous counties. C. S. Section 5482 (Michie's Code) embodies the provisions of Chapter 136, Public Laws of 1923, whereunder, when necessity arose, the Boards of Education of contiguous counties might create a joint school district and build a schoolhouse in that district in one or the other counties, and further provision is made therein for the upkeep of said school for the apportionment of costs and expenses, etc.

Since the State has taken over the entire support of the schools, with the exception of construction of schoolhouses, which is now the responsibility of the counties, the procedure provided in Section 5482 for the apportionment

of the costs and expenses connected with such a joint school is not now applicable, and this much of the statute is substantially repealed.

However, on account of the necessity of the case, the State adopted a policy with regard to the construction of these joint schools, which, I understand, are now as desirable as they were when the original law in 1923 was adopted. The same local convenience and necessity exists and must be served; and, in fact, not only did the law omit to abolish these local schools, but, in practice, an adjustment has been made by a method of managing the schools, by which they are continued.

Under the circumstances, it is my opinion that so much of the statute (C. S. 5482) as provides for the creation of these school districts of parts of contiguous counties was not repealed by any of the school Machinery Acts subsequently adopted, and is still in force and effect.

Since, generally speaking, the School Commission is now given the authority to create school districts, which authority had heretofore existed exclusively in the Boards of Education, the authority, given Boards of Education of contiguous counties to create joint districts must be considered an exception applicable to the particular situation.

SUBJECT: INDIANS; ELIGIBILITY; STATE NORMAL INDIAN SCHOOL;
CH. 51, 1885, AS AMENDED BY CH. 195, 1929

28 October, 1937.

We have yours of October 21, transmitting letter from Hon. George E. Butler with reference to the opportunity for certain Indians residing in Sampson County to enter the State Normal Indian School at Pembroke.

Chapter 51 of the Public Laws of 1885, as amended by Chapter 195, Public Laws of 1929, sets out definitely the qualifications for eligibility to attend the Normal School. The School was created under the Act of 1885. Section 3 of Chapter 51 ordered the county board of education to take a census of all the Indians then living in Robeson County between the ages of six and twenty-one. The Act provides that these Indians and their descendants should be entitled to use of the separate schools created in Robeson County.

Chapter 195 of the Laws of 1929 stipulates that all persons of the Indian race of Robeson County, who are descendants of those that were included in the census taken under the Act of 1885, are entitled to attend the Normal School, regardless of sex and irrespective of residence in Robeson County, so long as they are resident within the State, and are not under thirteen years of age.

The Act of 1929 names a committee to hear and determine all questions concerning the admission to the schools for Indians in Robeson County. The committee is given exclusive jurisdiction, with appeal from its decisions to the Superior Court of Robeson County.

By use of the phrase, "Indian race of Robeson County," the Act of 1929 seems not to intend that this includes only residents of that county, since it further provides that Indians of that race shall be entitled to attend the School provided they are residents of North Carolina. It seems, rather, to refer to the race of Cherokee Indians. Nevertheless, under the Act no member of the tribe is entitled to attend the Normal School unless descended from those Indians who were included in the census taken pursuant to the

Act of 1885. And whether any particular Indian is so qualified is a question to be determined by the afore-mentioned committee.

SUBJECT: DISTRIBUTION OF COUNTY-WIDE VOCATIONAL EDUCATION FUNDS

18 December, 1937.

It is true that the School Machinery Act,—Chapter 394, Section 15, Public Laws of 1937,—requires that county-wide current expense funds shall be distributed to the schools on a per capita enrollment basis.

However, the School Machinery Act of 1933 especially referred to funds which were raised by the county for vocational training, limiting the application of such funds to schools already in existence; Section 4, Chapter 562, Public Laws of 1933.

Section 9, Chapter 445, Public Laws of 1935, liberalized this law to the extent that it contemplated the extension of vocational training into other schools where it had not theretofore been taught.

Under the 1937 Act, a budget must be made and submitted to the County Commissioners, which budget contains in detail the needs of the schools and, more particularly for consideration here, the needs of the schools as to vocational training. It is recognized, of course, that vocational training is not given in all of the schools, but only in a limited number of such schools, and such budgets are submitted upon the amount necessary to give that training in schools in which vocational training is taught, with due regard to the fact that it is not at present taught in all the schools of the county and, therefore, the application of the term "current expense" in this connection may be fairly confined to those schools in which such vocational training is given.

I am, therefore, of the opinion that a proper interpretation of the requirement of the 1937 School Machinery Act as to the distribution of county-wide current expense funds in this particular is that it cannot have that application to these schools.

In this connection, I am strengthened in the conclusion at which I have arrived, because the levy and collection of a tax for vocational training, and the distribution of the proceeds thereof to all the schools in the county in a large number of which vocational training is not given, would be a violation of the requirements of the budgetary system and would be a misappropriation of the tax collected.

SUBJECT: TAXATION; EXEMPTION OF SCHOOL EQUIPMENT OF COMMERCIAL SCHOOLS

31 March, 1938.

Replying to yours of March 30 on the above subject, I beg to refer you to the Machinery Act, Sections 600 and 601, relating to exemptions from taxation of real property (600) and of personal property (601).

Since your inquiry relates to personal property only, I call your attention to Section 601 (4), reading as follows:

"The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes belonging to and exclusively used by churches, public libraries, colleges, academies, industrial schools, seminaries, or other institutions."

I think the language here employed is sufficient to provide an exemption for the property of commercial schools.

SUBJECT: SCHOOL LAW; ACQUISITION OF SCHOOL PROPERTY

30 April, 1938.

You submit to us a letter from Mr. R. H. Latham, Secretary, Asheville City School Board. It appears from this letter that the School Board is anxious to enlarge the school grounds adjoining the Stephens-Lee High School in the City of Asheville, for the reason that the grounds are insufficient to properly take care of the pupils in this school. He specifically inquires if satisfactory price cannot be obtained from the adjoining property owners what legal proceedings may be had in order that this adjoining property may be acquired. The school authorities may institute condemnation proceedings under the general condemnation law. There are certain restrictions contained in this law as to what kind of property may be condemned. If this adjoining property is not of such a character which would prohibit condemnation proceedings under the law, they could, of course, proceed to condemn it for school purposes.

Of course, under the general law, they have authority to acquire property for school purposes, and if the site which they now have is inadequate, additional property could be acquired, since the enactment of the 1933 School Machinery Act, any condemnation proceedings would have to be instituted by the County Board of Education.

SUBJECT: SCHOOL LAW; CONSTITUTIONAL SIX MONTHS SCHOOL TERM; DUTY OF COUNTY COMMISSIONERS TO PROVIDE FOR NECESSARY SCHOOL BUILDINGS

14 June, 1938.

I have your letter of June 9, in which you refer to and quote the first sentence of the last paragraph of the opinion in the case of Hallyburton v. Board of Education, 213 N. C. 9. You ask my opinion as to whether or not the Boards of County Commissioners "are not as much obligated as heretofore to construct school buildings, provided they stay within the limitations of Article V, Section 4, as amended in the general election of 1936."

The answer to your question is provided by the opinion in the Hallyburton case and in the paragraph from which you quote in part. The whole paragraph reads as follows:

"The primary duty to provide for a six months public school during each year and to furnish the necessary buildings and equipment therefor rests primarily upon the State. The State in turn is empowered to, and has, delegated to the several counties the duty to furnish the necessary buildings for the constitutional school term. The board of commissioners of a county, however, are without authority to comply with this delegation of power in violation of the provisions of the section of the Constitution under consideration without first submitting the question to a vote of the people. If the people of the county or other municipal corporation will not by their vote authorize an increase of the bonded debt beyond the prescribed limitations the State will have to devise other means to meet the requirements of the Constitution in respect to education."

The decision in this case has not overruled the former decisions of the

Court as to the duty of the boards of county commissioners to provide the necessary buildings for the constitutional six months school term. The above quoted paragraph says that this duty has been delegated to the several counties and that they must furnish the necessary buildings for the constitutional school term. The opinion, however, points out that this duty is limited by the requirement that the issuance of bonds to defray the costs of such buildings is subject to the constitutional debt limitation provisions contained in Article V, Section 4, of the Constitution as amended.

SUBJECT: SCHOOL LAW; SIGNING OF TEACHERS' CONTRACTS

14 June, 1938.

Receipt is acknowledged of your letter of June 13, attaching a letter from the Superintendent of Brunswick County Public Schools. In this letter the Superintendent says that the Chairman of the Board of Education refuses to execute contracts with two teachers who have been duly elected by the Board on account of his disapproval of the teachers.

In these circumstances, I think the contracts should be executed in the name of the Board by the other members of the Board and attested by the Secretary. If executed in this way, I am of the opinion that it would comply with the requirements of the School Machinery Act of 1937, Section 7.

SUBJECT: SCHOOL MACHINERY ACT; SCHOOL BUSES

20 June, 1938.

The letter from Mr. W. R. Mills, Superintendent Franklin County Schools, raises the question as to whether or not, if the Franklin County Board of Education furnishes transportation to W. P. A. workers to and from their places of employment, the Board of Education would be liable in a suit for damages in case there was an accident and one of such workers received an injury during the course of such transportation.

We do not think, in the first place, that your Board of Education has the authority to use school buses for this purpose. The last sentence in Section 24 of the School Machinery Act provides specifically that "the use of school buses shall be limited to the transportation of children to and from school for the regularly organized school day."

If authority should exist, however, and if the Board of Education actually does furnish transportation to W. P. A. workers as outlined above, no action could be maintained against said Board to recover damages for a tort alleged to have been committed by said Board in the performance of its statutory duties. *Benton v. Board of Education*, 201 N. C. 653, 656.

OPINIONS TO COMMISSIONER OF REVENUE

SUBJECT: JOHNSTON COUNTY ELECTRIC MEMBERSHIP CORPORATION;
LIABILITY FOR FRANCHISE TAX

2 July, 1936.

It is noted that the attorney for this corporation contends that it is not liable for the franchise tax imposed by Section 203, Revenue Act of 1935. This contention is based upon the language employed in Chapter 291, Subsections 5 and 14, Public Laws of 1935. Under Subsections 5 and 14, provision is made that all property owned by the corporation and used exclusively for the purpose of the corporation, shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State.

There is no express exemption of such corporation from the franchise tax imposed by Section 203 of the Revenue Act of 1935, unless such exemption arises by reason of the declaration of the act in Subsection 14, that such corporation is declared to be "a public agency and shall have within the limits for which it was formed, the same rights as any other political subdivision of the State."

This provision indicates a declaration of public policy on the part of the Legislature to treat this corporation and its property and operations as a municipal corporation. While it may be doubted whether or not such a corporation is either a municipal corporation or a quasi municipal corporation, yet I am of the opinion that as an administrative officer of the State you should recognize the public policy as declared by the Legislature in the enactment, unless the courts in a properly constituted case should declare that the act failed to accomplish its manifest purpose.

While entertaining some doubt about it, I would be inclined to advise that in my opinion, the franchise tax on such corporation should not be collected by reason of the elimination of the municipal corporation in the taxing act.

SUBJECT: INHERITANCE TAX; ADJUSTED SERVICE CERTIFICATES;
TAXABILITY

7 July, 1936.

Your letter of June 27 received.

It has been formerly ruled by this Department that war-risk insurance is not subject to State inheritance tax. This ruling is based upon 38 U. S. C. A. 454, which states in part:

"The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV, and shall be exempt from all taxation."

Section 618, which has reference to the Adjusted Service Certificates, is practically in the same language. It provides:

"No sum payable under this Chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of

this Chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate shall be subject to attachment, levy, or seizure under any legal or equitable process, or to National or State taxation,”

In view of the similarity between these two Sections, it is our opinion that the rule as to taxability for inheritance purposes should be the same upon Adjusted Service Certificates as upon War Insurance.

In *Martin vs. Guilford County*, 201 N. C. 63, it was held that land purchased from funds received from the Federal Government under Parts II, III, and IV of Title 38 was not exempt from a property tax. But as the theory advanced there was that the exemption does not apply after the money has been spent for property, the decision does not seem to answer the present question.

The view that has been taken above must be qualified in one respect. It was held in a case just handed down by our Supreme Court that the exemption mentioned in the Federal Statutes does not apply when the fund has been put in a bank to the credit of the veteran. The decision also reaffirmed the view taken in *Martin vs. Guilford County*, *supra*.

It seems safe to say that under this decision the exemption mentioned in Section 618 applies only when the proceeds from the bonus are in the same form as they were when received. So long as they remain intact, however, we are of the opinion that such funds are exempt from inheritance tax liability.

SUBJECT: PEDDLER'S TAX; WHOLESALE DEALERS IN KEROSENE AND OILS;
EXEMPTIONS; SECTION 121, CURRENT REVENUE ACT

8 July, 1936.

Your letter of June 27 received.

You state that the taxpayer, a wholesale dealer in gasoline and oils, buys and sells kerosene and motor oils in large quantities and peddles the same through several counties in the State. There are no orders taken except from the truck as it passes through various counties in which he operates. You inquire if such operation will subject this taxpayer to the peddler's tax imposed by Section 121, current Revenue Act.

This Section is in part as follows:

“Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise and offer to sell or barter the same, or actually sells or barter the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, *with an established warehouse in this State and selling only to merchants for resale,*”

You further advise that this taxpayer not only sells to merchants for resale but barter and sells the same to the actual consumer. If this fact can be established, there is no question but what such person would be liable for the peddler's tax under the above Section.

SUBJECT: BEVERAGE CONTROL ACT; WHOLESALE AND RETAIL DISTRIBUTORS

8 July, 1936.

Your letter of July 7 received.

You inquire first if there is any limit to the amount of beer a distributor may sell to an individual. C. S. 3411 (7) provides in part that whole-

salers may be licensed to sell beverages in barrels, bottles, or other containers in "quantities of not less than one case or container to a customer." This, apparently, is the only limitation in the Act as to the amount of beer that may be sold to an individual.

You inquire second if the distributor is criminally liable if he sells beer to a person unlicensed by the State, knowing that such person offers it for resale.

An examination of the Act discloses that originally wholesalers were prohibited from selling beverages to persons other than those licensed under the Act for resale; that is to say, retail dealers. However, by enacting Chapter 558, Public Laws of 1933, the General Assembly amended the Act, striking out this provision and inserting in lieu thereof the words "in quantities of not less than one case or container to a customer."

We are, therefore, of the opinion that there would be no criminal liability upon the distributor who sold beer to an unlicensed retail dealer. The only person indictable in such cases would be the retail dealer himself.

C. S. 3411 (27), which is Section 25, Chapter 319, Public Laws of 1933, provides that it shall be a misdemeanor to violate any of the provisions of the Beverage Control Act. Therefore, a person who sells beer without a license to engage in such business would be guilty of a misdemeanor.

SUBJECT: FRANCHISE TAX; FERRY COMPANIES

22 July, 1936.

Careful consideration has been given to your letter of July 16, asking my opinion as to the application of the franchise tax under Section 203, Revenue Act of 1935, to individuals, firms and corporations, engaged in operating ferries on prescribed schedules and having fixed charges for conveyance of passengers, automobiles, etc.

The tax imposed under Section 203 (1) is upon persons, firms and corporations other than municipal corporations engaged in the business of furnishing electricity, electric lights, current, power or gas, owning and/or operating a water or public sewerage system, or owning and/or operating a street railway, including automobile busses, for transportation of freight or passengers for hire.

The taxing provision does not mention or include those engaged in operating ferries. The only basis upon which contention might be made that such business was included in the taxing provision of this Section is found in the italicized heading of the Section, which mentions the above named business and "other similar public service companies not otherwise taxed." It is to be noted that such language is not found in the taxing language under Subsection (1). Absence therefrom of this language would exclude the possibility of reading into the Section this tax upon the business of operating a ferry. The caption or heading of a statute may be considered in connection with construing the language found in the taxing statute when the meaning therein may be obscure. In this instance, there is no language in the Section which could be amplified by construction of the preliminary statement in the Section.

The operation of a ferry is dissimilar rather than similar to other businesses named in the Section. It is entirely a distinct type of business. It is true that it is properly classified as public service, the owners of the

ferry having rights of condemnation of property for certain purposes and other charges being fixed by law. C. S. Article 12, Sections 3819 and 3838 (b) inclusive. The statute, however, does not attempt to tax all public service corporations, individuals, etc., but only those engaged in the business named in Subsection (1).

In view of the fact that it is legislatively recognized that these ferries must be subsidized in order to continue in operation, a legislative reason is furnished for excluding them from the tax. Under C. S. 7971 (69), Section 705, Revenue Act of 1935, ferry companies are mentioned and otherwise taxed under the provisions of that and following sections. In my opinion, the franchise tax under Section 203 against such a business could not be sustained.

SUBJECT: HIGH POINT YARN MILLS, INC., BANKRUPT; FRANCHISE TAX

23 July, 1936.

You have requested the opinion of this department with respect to the liability of the trustee in bankruptcy appointed for the High Point Yarn Mills, Incorporated, for the North Carolina franchise tax and in this connection you have referred to us a letter from Honorable Rupert T. Pickens, Attorney at Law, High Point, North Carolina, under the date of July 16, 1936. Authorities are cited by Mr. Pickens in support of his contention that the trustee in bankruptcy for this corporation is not liable for the franchise tax. It appears from his letter and the facts presented by you that the trustee in bankruptcy, under orders of the district court, was operating the property.

The question presented appears to be determined against the contention of the trustee under Act of Congress, June 18, 1934, c. 585, 48 Stat. 993, U. S. C. A. 28, Section 124a, which reads as follows:

"S 124a. State taxation; business conducted by receivers, trustees or other court officers subject to

Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: Provided, however, That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

Mr. Pickens in his letter does not refer to this statute and apparently did not have it in mind in writing you. Under the provisions of this law you are authorized to apply the franchise tax to this operating trustee in bankruptcy.

Section 1190 is inapplicable as the trustee in bankruptcy was authorized to continue the business of the corporation. The automatic cancellation of the charter of the North Carolina Corporation under C. S. 1190 occurs only in case the corporation is unable to conduct the business for which it was organized by reason of the bankruptcy proceedings. The corporate

function is continued in the trustee in bankruptcy under the order of the court authorized by U. S. C. A. 28, Section 124.

SUBJECT: PROCESS TAX; RECORDER'S COURT

24 July, 1936.

Your letter of July 23 received.

This office is of the opinion that process tax should not be assessed in a bill of costs in criminal actions in Recorder's Courts.

SUBJECT: MOTOR VEHICLE LAW; REFUND OF LICENSE FEES; CHAPTER 375,
PUBLIC LAWS OF 1933, SECTION 30 (B)

28 July, 1936.

You state that taxpayer purchased a new truck and used it approximately 7 days when the vehicle was wrecked and completely destroyed by fire. You inquire if, under the last sentence in the above statute, authority exists for a refund on the unexpired portion of the cost of the original license.

The Section referred to above is as follows:

"... Upon satisfactory proof to the Commissioner of Revenue that any motor vehicle duly licensed has been completely destroyed by fire or collision, the owner of such vehicle may be allowed on *the purchase of a new license for another vehicle* a credit equivalent to the unexpired portion of the cost of the original license, dating from the first day of the next month after the date of such destruction."

We are of the opinion that no such refund could be allowed under this statute and that the only consideration which could be given would be the allowance of a credit equivalent to the unexpired portion of the cost of the original license only when such taxpayer desires to purchase a new tag for another vehicle.

SUBJECT: HIGHWAY SAFETY ACT; DRIVER'S LICENSE; APPLICATION
FOR NEW LICENSE

28 August, 1936.

Your letter of August 27 received.

You state that Charles D. Harris was convicted on May 29 on a charge of driving a motor vehicle while under the influence of intoxicating liquor, and that his license was revoked as of May 29. He now makes application for a new driver's license. You inquire of this Department for an opinion as to how much time must expire from the time a driver's license has been revoked before the Department is authorized to issue such operator a new license.

Section 4 (b), Chapter 52, Public Laws of 1935, provides in part as follows:

"The department shall not issue an operator's . . . license to any person whose license . . . as operator . . . has been revoked under the provisions of this act until the expiration of one year after such license was revoked."

It is also provided in Section 13 of the above act:

"... and upon revoking shall not in any event grant application for a new license until the expiration of one year."

This is to advise, therefore, that since this operator's license was revoked for the reason that he had been convicted for violating the law with regard to drunken driving, as prescribed in Section 12 of the act, that the Department could in no event by the expressed terms of the statute either grant an application for a new license, nor could it restore to such operator the license which has heretofore been revoked.

SUBJECT: TAXATION; PRIVILEGE TAXES; ENFORCEMENT IN UNITED STATES TERRITORY—PISGAH NATIONAL FOREST

12 September, 1936.

In a recent letter upon the above subject you have inquired whether or not the State Taxing Laws, and especially the laws relating to privilege taxes, may be enforced in Pisgah National Forest.

In my opinion they cannot. The authority of the State to enforce its taxing laws, or, in fact, any other laws, in territory ceded to the United States depends largely upon the reservations mutually agreed upon at the time of the cession of the property. Examining into the laws relating to the acquisition of the Pisgah National Forest by the United States, and the cession or conveyance of this territory to the said United States, has convinced me that no such reservation was made with respect to the territory, and, therefore, the taxing laws cannot be enforced.

SUBJECT: REVOCATION OF LICENSE

19 September, 1936.

You state that the above named person was convicted in Recorder's Court at Plymouth, N. C. in August of this year for driving an automobile while under the influence of whiskey; that he gave notice of appeal to the Superior Court, and that you have suspended his driver's license pending this appeal. You inquire if you have authority to do this.

There is no question but what under the provisions of Sections 11 and 18, Chapter 52, Public Laws of 1935, that your Division has ample authority to suspend a driver's license pending an appeal. Mr. Bradshaw's attorney is erroneously of the opinion that the revocation of a driver's license for driving an automobile while under the influence of whiskey is a part of the punishment for such a violation of the law. The act in itself is purely and simply a police measure enacted for the protection of the public generally and is not a punitive statute for violation of the law.

SUBJECT: AUTOMOBILE DRIVERS' LICENSE; SUSPENSION OF NON-RESIDENT'S PRIVILEGE

19 September, 1936.

I understand from the letter of Corporal George I. Dail that difficulty has been experienced in applying the State laws to some soldier who constantly drives from the town of Edenton and drives his father's car without license. From that letter it appears that he was recently acquitted of a charge of driving drunk and driving without an operator's license. The Court is said to have held that he was not guilty because he was not a resident of any State.

I am of the opinion that this man was required to have an operator's license in his possession before he could operate his father's car in this State. Chapter 52, Public Laws 1935, makes the general requirement that a person operating a motor vehicle in this State must have a license therefor. See Section 2. In order to adjust the law thoroughly to the situation of non-resident drivers, and possibly to relieve the whole Act from any suspicion of unconstitutionality as it applies to non-resident drivers, certain exemptions are made in Section 3 of the Act. These exemptions proceed by way of giving the privilege of driving here without a State license from this State to certain persons. The applicable provisions here are sub-sections (c), (d), (e), and (f) of Section 3, and particularly sub-section (e), as to operators generally.

The law provides for a suspension of the privilege given to a non-resident to operate a motor vehicle here in Section 3 (c), the authority being conveyed in Section 16.

It is apparent that this man had no driver's license authorizing him to drive a private motor vehicle either in this State or anywhere else, and most certainly the fact that he was a non-resident, if he was, did not permit him to drive upon the roads of this State in a drunken condition.

Upon a charge properly drawn, a non-resident of this State who does not have in his immediate possession a driver's license issued to him in his home state or country, may be convicted under the laws of this State for driving without license, and his privilege to operate an automobile in this State, although he be a non-resident, may be cancelled or withdrawn.

This applies to a soldier of the United States Government who is not at the time driving a car by permission or instruction of United States Authorities upon government business.

Our laws upon this subject are referred to the police power of the State and, in my opinion, do not conflict with any provisions of the United States Constitution or any military rules and regulations, or rules and regulations for the conduct of army affairs.

SUBJECT: INCOME TAX; GROSS INCOME; SALARIES OF CONSTITUTIONAL STATE OFFICERS, INCLUDING JUDGES OF THE SUPERIOR COURT

21 September, 1936.

A letter has been received by this department from one of the Judges of our Superior Court, in which a request is made that my opinion should be furnished as to the constitutionality of the provision contained in Section 317, Chapter 445, Public Laws of 1933, otherwise known as the Revenue Act of 1933, and a similar provision contained in the Revenue Act of 1935. The inquiry also involves the question as to the application of the provision referred to, to the salary of the Judge of the Superior Court making this inquiry. You have also requested my opinion and advice on this question.

Section 317, Revenue Act of 1933, provides, as far as is pertinent to this inquiry, as follows:

"The term 'gross income' as used in this Act shall include the salaries of all Constitutional State officials taking office after the date of the enactment of this Act, by election, re-election or appointment, and all Acts fixing the compensation of such Constitutional State officials are hereby amended accordingly."

Exactly the same language appears in the same Section in the 1935 Revenue Act.

The question arises by reason of the provision in the Constitution of this State, Article IV, Section 18, which provides as follows:

"Section 18. Fees, salaries and emoluments. The General Assembly shall prescribe and regulate the fees, salaries and emoluments of all officers provided for in this article; but the salaries of the Judges shall not be diminished during their continuance in office."

The Judge making the inquiry was elected as a Judge of the Superior Court in Fall elections of 1934, and is now serving the term for which he was elected, which began on January 1, 1935.

It is unnecessary here to review the history of this constitutional provision. In the case of *Long vs. Watts*, 183 N. C. 99, in an opinion written by Justice Stacy, this was fully gone into, making repetition unnecessary. See also the concurring opinion of Chief Justice Clark.

In *Long vs. Watts*, supra, the court held as follows: (quoting from syllabus)

"The constitutional restriction of the Legislature not to diminish salaries of Judges during their continuance in office is still in force and unaffected or disturbed by the Amendment of 1920, and though their income from other sources may be taxed, a tax on their salaries during their term of office is to diminish their income from such source in contravention of the express terms of the Constitution, Article IV, Section 18. Further indicated by Article I, Section 8, providing that 'the legislative, executive and supreme judicial powers of the Government are to be forever separate and distinct from each other'."

In this case the court concluded that the salary of Judge B. F. Long, a Judge of the Superior Court, who was in office at the time of the adoption of the Constitutional Amendment of 1920, was not subject to income tax imposition levied by Chapter 34, Public Laws of 1921.

In this case the opinion refers to and quotes from opinions filed by Attorney General Walser, Attorney General Batchelor and Attorney General Gilmer. These opinions were rendered upon the law as it then existed and were accepted by the court in support of the conclusion reached.

The opinion in *Long vs. Watts* was also rested upon the case of *Evans vs. Gore*, 253 U. S. 245, 64 L. ed. 887. In *Evans vs. Gore*, the United States Supreme Court reached the same conclusion and it held that under the similar clause of the Federal Constitution, Congress was without authority to subject the salaries of the Federal Judges during their continuance in office to the Federal income tax.

By the decision in *Long vs. Watts*, the question was determined and did not arise in North Carolina until the enactment of the provision above quoted in Section 317, Revenue Act of 1933. This provision in our law was suggested by the Federal Income Tax Law, Title 26, U. S. C. A. Section 22, which provided as follows:

"In the case of Presidents of the United States and Judges of the courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in the gross income; and all acts fixing compensation of such Presidents and Judges are hereby amended accordingly."

After the decision of *Evans vs. Gore*, an opinion was filed by Honorable William L. Frierson, Acting Attorney General of the United States, under date of June 21, 1920, *Opinions of Attorney General*, Volume 32, page 248, in which the view was expressed that the salaries of the Judges of the Supreme and District Courts of the United States, appointed subsequent to the enactment of the Revenue Law of 1918, were subject to the income tax imposed by 40 Stat. 1057, 1065.

In *Long vs. Watts*, in the opinion of Justice Stacy, it was stated:

"Furthermore, we do not think it was the intention of the Legislature that the proposed tax should be collected."

The enactment of the provision of the 1933 law is an express and unequivocal declaration by the General Assembly of the State that gross income, as used in the income tax law, shall include the salaries of Constitutional State officials taking office after the date of the enactment of the law. Thus, no question can now exist as to the intention of the General Assembly to apply the income tax to salaries of Judges "taking office after the date of enactment of this act."

It is to be observed that the provision not only makes the direct requirement above referred to, but makes this important provision: " * * * and all acts fixing the compensation of such Constitutional State officials are hereby amended accordingly." Careful examination of the opinion in *Long vs. Watts*, leads to the conclusion that nothing was said therein which could be understood as preventing the Legislature from amending the salary act and fixing the compensation of the Judges so as to reduce the salary to the amount equivalent to the income tax imposition. The legislative provision, therefore, appears to have been directly framed to meet the effect of the opinion in *Long vs. Watts* and carry out the legislative intent of reducing the salaries of the Judges to the amount equivalent to the income tax by amendment of the salary acts.

As to a Judge who took office after the 1933 enactment and prior to the reenactment of the law in 1935, it would seem to be clear that the Legislature was exercising its constitutional privilege of fixing the salaries of the Judges, Article IV, Section 18, and that such Judges' salaries could be constitutionally reduced as so provided, as to any appropriate application of our 1933 income tax Act.

The question arises as to a Judge who takes office on the first day of January, 1935. A tax is demanded of this Judge on his income earned during the calendar year of 1935, under Section 310 of the Revenue Act of 1935. During a part of this tax year the Revenue Act of 1933 was in force and operation. The Revenue Act of 1935 was ratified on the 9th day of May, 1935. It is provided in Section 490 of the Revenue Act of 1935, Chapter 371, Public Laws of 1935, as follows:

"The taxes herein designated and levied shall be payable in the existing national currency, State, county, and municipal taxes levied for any and all purposes pursuant to this act, shall be for the fiscal year in which they become due except as otherwise provided * *."

It is provided in Article IV, Subsection 9, Revenue Act of 1935, as follows:

"9. The words 'income year' mean the calendar year of the fiscal year upon the basis of which the net income is computed under this

act; if no fiscal year has been established they mean the calendar year."

Under the income tax law, Section 315, the following provision is made:

"The tax imposed by this article shall be levied, collected and paid in the year One Thousand Nine Hundred and Thirty-Six, and with respect to the net income received during the calendar year of 1935 and annually thereafter."

It, therefore, appears that the act levying the tax which is brought into question in this case is the Revenue Act of 1935, having as a basis for the tax that part of the income of the Judge which was received or earned prior to the adoption of the 1935 act, as well as that part of it which was earned during the balance of that calendar year.

The suggestion is made that by reason of the fact that the Judge entered upon his term of office on the first day of January, 1935, his salary is diminished during his continuance in office by the imposition of the provisions of the Revenue Act of 1935, thereby violating the constitutional provision hereinbefore quoted.

It is to be observed that the Section levying the tax, Section 310 of the 1935 Act, levies exactly the same rates and on the same basis as those levied by the same Section in the 1933 Act. In the event that the rates of the tax were increased in the 1935 law over that imposed by the 1933 law, the question might be differently presented. As it is, the rates and bases correspond.

The provision in the 1933 act hereinbefore quoted made direct provision that the income tax levied by that law should have application to the salaries of all Constitutional officers and that the act fixing the salary of any Constitutional Officer should be considered as amended to the extent of diminishing the salary in correspondence with the tax. The same provision was reenacted in 1935.

The question arises as to whether or not the provision referred to in the 1933 law was repealed by the enactment of the Revenue Act of 1935. The repealing provision of the 1935 act is as follows:

"Section 509. This act, after its ratification, shall constitute authority for the imposition of taxes upon the subjects *herein revised*, and all laws in conflict with it are hereby repealed * *."

There is no express repeal of the provision contained in Section 317 of the 1933 Revenue Act. It is to be observed that the repealing clause in Section 509 of the 1935 act limits itself to the extent of a conflict with previous laws imposing taxes. Nowhere in the act is there any express repeal of the provisions of the 1933 act in toto. Section 509 refers to the authority for the imposition of taxes upon the subjects "herein revised." There was no revision whatever as to the taxing section of the income tax law of 1933, either as to rates or as to any matter affecting the application of the tax in the case under consideration.

The salaries of the Judges of the Superior Court are fixed by C. S. 3884. This Section of the Consolidated Statutes which made provision for the Judges' salaries was by the 1933 act amended by the language contained in Section 317, Revenue Act of 1933 by the following language:

"And all acts fixing the compensation of such Constitutional State officers are hereby amended accordingly."

The salary act, C. S. 3884, having thus been amended in 1933, continues

in its amended form as the controlling basis of compensation of the Judges unless the reenactment of the exact language in the 1935 Revenue Bill has by necessary implication the effect of repealing the amendment and re-enacting it over again in *ipsisimis verbis*. In my opinion, this result could not be considered logically or necessarily to follow. The repealing clause contained in the 1933 act has been continuous and effective since the date of the adoption of the 1933 act.

Such diminution as exists in the salary of the Judge of the Superior Court as results from inclusion of the salary paid by the State to a Judge, in my opinion, has been continuously in effect since the adoption of the 1933 act. The salary of the Judge under consideration having begun upon his induction into office on January 1, 1935, in my opinion, his salary has not been diminished during his continuance in office in violation of the constitutional provisions.

The Judge accepted the office on January 1, 1935, and did so with the knowledge that the 1933 act had amended the law fixing the Judges' compensation to the extent that the same might be diminished by application of the income tax rates on net incomes provided by the 1933 act. As no change whatever was made in the law in the 1935 Revenue Act, the decrease in the salary remains the same as provided by the 1933 act. I am, therefore, of the opinion that the provision contained in Section 317, Revenue Act of 1935, hereinbefore quoted, as applied to the salary of the Judge of the Superior Court who came into office on the first day of January, 1935, is not violative of the Constitution and that the tax against the net income so derived can be properly applied.

SUBJECT: INCOME TAXATION; DEPRECIATION; INCOME TAX LAW OF 1935
CONSIDERED AS TO RETROACTIVE EFFECT; REVISION OF ASSESSMENT
OF ADDITIONAL TAXES FOR YEARS PRIOR TO 1935

24 September, 1936.

I undertake to reply to your memorandum of August 20, 1936, hoping you may get from this letter, and the memorandum attached, the information you require.

I regret that my letter of December 4, 1935, did not cover the question you now present, but I fear that I did not at that time have clearly before me the problem with which the Department was attempting to deal.

I understand that the gist of your inquiry is whether or not the changes from preceding laws which are contained in the Revenue Act of 1935, Section 322 (8) (cp. similar sections 1933 and 1931 laws), warrant an interpretation which would modify the 1931-33 acts so that a method of computing net income not applicable under the 1931-33 acts, but authorized by the 1935 Act, might be used for the years when the 1931-33 laws were in force. Such a modification, I take it, would refer either to a justification or a correction of computations already made during these years, under which taxes are due or have been paid and presumably might affect either demands for refunds or assessments of additional tax for those years.

In considering the changes made in the Revenue Law, and the relation of each successive enactment to the one preceding, I think we had best understand that in their development our Revenue Laws do not proceed by way of amendment or accretion to already existing law, but at each session of

the Legislature,—ordinarily every two years,—an entirely new Revenue Law is enacted, complete in form. These are intended to be comprehensive and exclusive upon the subjects with which they deal, except as they otherwise provide, and do not bring forward the old laws except by direct reference or necessary inference, nor do they form an accretion or addition to former laws. Ordinarily the only point of contact between these laws is the continuity of the subjects with which they deal, and not the continuity of the laws themselves; for example, the preceding law may so have dealt with property with respect to its depreciation as to give it a history or status which may or may not affect the application of a succeeding law, according to the interpretation which we must give it.

In my opinion, however, there is nothing in the 1935 law, Section 322 (8), relating to depreciation, which contains any authority for reconsideration or revision of computations or reassessment of any tax imposed under the 1931-33 laws.

The 1935 Act, Section 322 (8) does have certain textual changes of far reaching importance, which for convenience are quoted:

“8. A reasonable allowance for depreciation and obsolescence of property used in the trade or business shall be measured by the estimated life of such property; and in case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion. The cost of property acquired since January 1st, 1921, plus additions and improvements, shall be the basis for determining the amount of depreciation, and if acquired prior to that date the book value of the property shall be the cost basis for determining depreciation.

* * * *

“In case the Federal Government determines depreciation or depletion of property for income tax purposes upon the basis of book value instead of original cost, the depreciation allowed under this act shall be upon the same basis.”

The inclusion in this law of the rule that allowances for depreciation and obsolescence should be measured by the estimated life of the property involved may be of significance, in some instances, of more importance than was attached to it when it was merely an administrative rule. This I cannot now develop; but the last paragraph quoted, which makes the basis for depreciation under the State law “book value” in case the Federal Government “determines depreciation” upon that basis, is of major importance. An examination of the Federal Income Tax Laws of 1932 and 1934 convinces me that the present determination of depreciation under the Federal Laws comes sufficiently near to the definition which we must give “book value” in our laws as to make this paragraph controlling in the computation of taxes under the State Law. Perhaps the circumstance that our State Income Tax Law and the Federal Income Tax Laws have thus been brought into agreement, and it could be expected that the administration under our State Law could also be correlated to that under the Federal Law, has given some support to the suggestion that the State might readit the tax returns with respect to depreciation, and impose an additional tax. As stated, however, I do not find that the 1935 Act constitutes any authority for such action.

While I do not think that the 1935 Act is available as authority under which the taxes to which the 1931-33 acts apply, or to correct the inequalities pointed out in your letter relating to the effect of the interpre-

tation given the 1931-33 laws as to property acquired prior to January 1st, 1916, I am convinced that under Sections 334 and 335, relating to review and corrections, and under the necessarily wide powers given you to determine *reasonable* allowances for depreciation, and with the further principle correctly stated in your letter that the purpose of the law is to amortize the original cost of the property during the period of its useful life (which should control the interpretation of the Act wherever possible), I believe that much of this inequality might be prevented through administrative handling, and might still be corrected with respect to depreciation allowances on much of the property involved in this discussion.

As to the illustration you give, I venture to suggest that the establishment of a new basis for depreciation, with respect to property already in fact depreciated and a substantial part of its estimated useful life past, does not necessarily have the effect of prolonging the period of useful life. With respect to such property, I think the Commissioner must take into consideration that part of the useful life which has already passed and adjust the allowance for depreciation to the remainder of the useful life.

In the instance given, the State is under no obligation to amortize the cost of the property, or any part of it, with respect to the five years from 1916 to 1921 when no tax was taken out of the income it produced; nor is the State bound to prolong the "useful life" period in such a way as to amortize a disproportionate amount of such cost.

Property acquired prior to January 1, 1916, is subject to deterioration or depreciation in the hands of the owner during the period of five years or more before the first Revenue Act dealing with income from property (Public Laws 1921) was passed; and the State should have no concern with such depreciation, nor any obligation to amortize the property with respect to that period, or make allowances for depreciation therefor. In my opinion, it has the right to take into consideration the circumstance that five years, at least, of its useful life expired prior to 1921, notwithstanding that the depreciation for that period is not reflected in the value basis set up in the statute for depreciation.

Wherever it appears that the original cost has been amortized, or should have been amortized during the whole period of useful life, (only a part of which has been dealt with by the State) under such reasonable rules as might be applicable the Commissioner may deny further depreciation allowances; and most certainly can adjust the depreciation allowances to the remainder of the useful life.

I know that rather drastic administrative rules would have to be applied to such cases on account of the frequent dislocations in the law occurring when new bases for depreciation have been established with reference to the same property, and each instance would have to be dealt with separately, but I do not think that the matter is beyond administrative correction.

SUBJECT: SCHEDULE "B" LICENSE TAX; FORTUNE TELLERS; SPIRITUALISTS

21 October 1936.

You state that a so-called "medium" or "spiritualist" has applied to your Department for a license; that the nature of this profession is that the operator, for a fee, goes into a trance, thereby receiving and delivering messages from the dead. You inquire if she is subject to any license tax under the Revenue Act.

We are unable to discover any tax liability for practices of this sort; however, we are of the opinion that persons claiming themselves to be astrologists who tell fortunes by reading or giving a horoscope for a fee are subject to taxation under Section 124 of the Revenue Act.

SUBJECT: UNIFORM DRIVER'S LICENSE ACT; OPERATING MOTOR VEHICLE
AFTER LICENSE REVOKED; PENALTY

26 October, 1936.

You ask for an interpretation of Section 22, Chapter 52, Public Laws of 1935, your particular inquiry being addressed to the question as to whether or not a person convicted under this Section would be guilty of a misdemeanor.

It will be noted in this Section that any person who shall drive a motor vehicle upon the highways while such operator's or chauffeur's license is suspended or revoked, "may be guilty of a misdemeanor." It is our understanding that a Recorder's Court Judge in one of the eastern counties has some doubt in his mind as to whether or not, due to the wording above quoted therefrom, an operator indicted under this Section would be guilty of anything.

We are of the opinion that the proper construction of this term would be that if there was sufficient evidence to convict in the minds of the Recorder's Court Judge or the jury, that a person indicted thereunder would be guilty of a misdemeanor; however, if the court itself could not construe the cause quoted above to this effect, certainly a person who was convicted of operating a motor vehicle while his license was under suspension or revocation would be guilty of a misdemeanor under the provisions of Section 29 of the Act which provides in plain terms that it shall be a misdemeanor to violate any of the provisions of the Act.

SUBJECT: DESCENT AND DISTRIBUTION; BASIS OF TAX ON TAXABLE
MOVABLE PROPERTY; NON-RESIDENT DECEDENTS

27 October, 1936.

You request my advice as to the basis of inheritance tax on the estate of a non-resident decedent who dies leaving an estate in North Carolina subject to inheritance tax which consists of tangible and intangible personal property. Your specific inquiry relates to the question as to whether or not this movable property is to be treated as descending under the laws of the State of North Carolina or the laws of the State of the domicile of the decedent. Under the North Carolina decisions in keeping with the decision of the courts elsewhere in this country and in England, personal property, tangible or intangible, descends to the next of kin of a decedent in accordance with the law of the State of domicile of the decedent. This rule applies in cases in which the property is located in States other than the State of domicile of the decedent. Cases in North Carolina declaring this rule are:

Moye vs. May, 43 N. C. 131;

Grant vs. Reece, 94 N. C. 720;

Jones vs. Lane, 144 N. C. 601.

See also 18 C. J. 809, Descent and Distribution, and 12 C. J. 476, Conflict of Laws.

Upon the death of a person dying intestate in another State leaving movable property in North Carolina subject to the inheritance tax law of the State, the tax is to be imposed, in my opinion, in accordance with the distribution of the property under the law of the State of domicile of the decedent.

SUBJECT: UNIFORM DRIVER'S LICENSE ACT

17 November, 1936.

We are of the opinion that the intention of the law with regard to the revocation of licenses is that, upon conviction of drunken driving, a license was to be revoked for a period of only one year, and where a license has been suspended pending an appeal from an inferior to a higher court, the one-year period should date from the date of conviction in the lower court. That is to say, in the case at hand, the date his license was suspended, and should not date from the day the case was finally disposed of in the higher court.

SALES TAX—PERSONAL PROPERTY EXEMPTION AGAINST EXECUTION FOR
COLLECTION OF TAX

2 December, 1936.

Re: George M. Long, Winston-Salem; I. A. Austin, Winston-Salem.

Two executions against the above parties respectively, for amounts due on sales tax as retail merchants have been exhibited to me, and I understand them to have been returned by the Sheriff of Forsyth County as not executed because of the demand on the part of the defendants in execution that a personal property exemption to the amount of \$500.00 be allotted to them respectively.

This is to advise you that the exemption provided in the Constitution, Article X, Section 1, against an execution for the collection of debt, does not apply to an execution for the collection of taxes due the State.

It is true that for some purposes, whether advisedly or not, taxes due under the Revenue Act are designated as "debt." This, I think, is for the purpose of convenient collection; but, at the time of the adoption of the Constitution, tax was not regarded as a debt in any sense of the word; and the interpretation placed upon the Constitution and the effect which must be given Article X, Section 1, must be considered in this light.

In my opinion, there is no personal property exemption against an execution properly issued by the Commissioner of Revenue for the collection of taxes due the State.

You understand, of course, that the license of each of these parties to do a mercantile business may be revoked for a failure to comply with the conditions under which such license is granted. Section 406, Revenue Act. After such revocation, the party attempting to continue in such business is subject to indictment.

SUBJECT: INCOME TAXATION; DEPRECIATION—1931, 1932, 1933, 1934

31 December, 1936.

1. In determining depreciation allowable under the Income Tax Laws of 1931 and 1932, you are authorized, in my opinion, in following the practice

of the Federal Government as set out in Treasury Decision No. 4422. This applies to any property, regardless of the year in which it was acquired.

(A) As to property acquired prior to January 1, 1916, you are directed by the law to use as a maximum basis for depreciation allowances the depreciated cost as of January 1, 1916, as adjusted by the United States Internal Revenue Department, as is done by the Federal Government. You have the right and authority in determining "a reasonable allowance for depreciation" in 1931, 1932, 1933, or 1934, to deduct from the basis, thus determined, the depreciation on such property which has been allowed under the North Carolina Law, and, if the circumstances warrant, re-determine the remaining useful life of the asset. The depreciation then to be allowed would be the undepreciated part of the asset, divided by the remaining years of useful life of the property.

(B) As to property acquired subsequent to January 1, 1916, and prior to January 1, 1921, the original cost, plus additions and improvements, is made the *maximum* basis for depreciation. For the years 1931, 1932, 1933, or 1934, in determining allowable depreciation, you may use the same method as described above.

(C) As to property acquired after January 1, 1921, the basis must be cost plus additions and improvements. Here you may also use the same method of allowance for depreciation by deducting allowed depreciation and dividing the result by the remaining useful life of the asset.

This practice has been followed by you, as you advise this office, as to the years 1932, 1933 and 1934. This is in conformity with the Federal practice and is fully authorized by the provisions of our law.

Our statute limits your determination of "a reasonable allowance for depreciation" in no way except as above pointed out by quotations from the statute. You are not confined to the "straight line" method. You have the right to consider the remaining useful life of the asset and the unrecovered cost. There are no provisions in the statute to the contrary.

"Basis for depreciation," as used in our statute, means that you must employ in your calculations:

(a) Adjusted value, as a *maximum*, for property acquired prior to Jan. 1, 1916;

(b) Cost plus additions and improvements, as a maximum, for property acquired between January 1, 1916, and January 1, 1921.

(c) Cost, plus additions and improvements, for property acquired after Jan. 1, 1921.

These provisions exclude you from using as a basis for depreciation the value of the property, replacement cost, or other standards different from those required by our statutes.

2. As you were advised in my letter of September 24, 1936, the taxpayer is not entitled to any offset against income taxes for any year for any depreciation of his property which occurred prior to the enactment of the income tax law in this State in 1921. Claims for refund based upon such contention should be disallowed, and offsets based upon such contentions should not be allowed.

This letter supplements my letter to you, on this subject, under date of September 24, 1936.

RE: WABENA MILLS, INC., INCOME TAX

5 January, 1937.

Basing my opinion upon the facts disclosed in the file in this case, I am of the opinion that the additional income tax and interest amounting to \$512.70, with respect to Wabena Mills, Inc., cannot be collected, as the tax had not become a lien upon the property at the time of the transfer of the assets to the Cayuga Linen & Cotton Mills, Inc., by a purchase at a foreclosure sale.

INCOME TAX—DEDUCTIBLE LOSS—LIGGETT AND MYERS TOBACCO COMPANY,
ST. LOUIS, MO.

26 January, 1937.

We have your file relating to the income taxes of the above corporation for the years 1932 and 1933. This corporation is contesting the ruling of the Department that an alleged loss claimed to have occurred in dealing with its own bonds was not allowed as a deductible loss.

While I think that a statement that a corporation cannot gain or lose by dealing with its own bonds is too broad (32 Col. L. Rev. 137) I am of the opinion that no deductible loss arose by reason of the transaction referred to in the Liggett and Myers report and in the correspondence in the file.

Without definitely stating as a rule which might be followed in all instances, it occurs to me that when a corporation deals with its bonds just as it would with the bonds of any other corporation, that is, purchases the bonds on an open market and resells them, a profit or loss might occur in comparing the purchase and sale. *Comm'r. v. S. A. Woods Machine Co.*, 52 F. 2d. 635; *Carter Hotel Co. v. Comm'r.*, 67 F. 2d. 642; *Spear and Co. v. Heiner*, 54 F. 2d. 134.

However, when a corporation purchases its own bonds upon an open market at a premium, and retires them, in my opinion no such deductible loss has been occasioned by the fact that a premium above face was paid, nor do I think, in case the bonds were not retired but not yet resold, is there any deductible loss.

Usually, the premium on any bond in the open market, while based upon many things, perhaps, is ordinarily demanded and paid, because such premium is justified by the life of the bond and its interest rate above the interest rate current at the time, thus affording what might be practically termed an investment at a lower rate of interest.

When the corporation itself has bought its own bond and thus anticipates interest on this basis,—and the interest which it would be compelled to pay in addition to face value at maturity,—it has certainly not lost any money.

SUBJECT: INCOME TAX; ANNUITY CONTRACTS

26 February, 1937.

It appears from the letters and contracts enclosed in your letter of February 22 that Dr. C. W. Sommerville entered into agreements with three religious and charitable organizations whereby he gave them certain definite sums in consideration of their paying to him each year during his life definite annual payments. In one of the contracts, it was stated that

he was to receive five per cent interest each year; in the others, he was to receive stated amounts.

The question arises whether or not Dr. Sommerville should include the yearly payments which he received under these contracts in making up his gross income.

The term "annuity" is often loosely applied to innumerable types of contracts. Those involved in this case, however, are annuity contracts in the proper sense of the word. That is, they are agreements to pay a stipulated sum per annum in consideration of a gross payment. (*People vs. Security Life Ins. Co.*, 78 N. Y., 114; *Life Ins. Co. vs. Knapp*, 184 N. C., 345; 1 *Couch on Insurance*, No. 25.)

Although there is some authority to the contrary, (see 3 C. J. S. 1375), the general rule is that there is a distinction between the terms "income" and "annuity." The former has reference to gain or profits made upon an investment, while the latter, consists of an absolute payment payable, irrespective of any question of profit. (*Tennent vs. Roose*, (Mich.) 255 N. W. 279; *In re Kohler's Will*, 183 N. Y. S. 550; 2 *Am. Jur.* 819.)

In *Town of Hartland vs. Damon's Estate*, (Vt.) 156 *Atl.* 516, 523, the Court, addressing itself upon this subject, said:

"An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits, though a certain fund may be provided, out of which it is payable." (Citations omitted.)

In spite of this general rule, it is necessary to examine closely the language of the particular statute involved, as it is well settled that the meaning of a term set out in the statute and defined by it depends more upon the specific language of the act than the general meaning of the term involved.

Fox vs. Standard Oil Company, 294 U. S., 87, 95:

"We are told that the average man if requested to point out to a stranger the store nearest by or even the nearest mercantile establishment would not be likely to think of a filling station as within the range of inquiry. There might be force in this suggestion if the statute had left the meaning of its terms to the test of popular understanding. Instead, it has attempted to secure precision and certainty by rejecting a test so fluid and indeterminate and supplying its own glossary."

Coming to the actual wording of the statute itself, we see that it reads in part as follows:

"The words 'gross income' mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind, and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever and in whatever form paid." (Sec. 317, Chapter 371, Public Laws of 1935.)

Obviously, the statute is very specific in its classification of the various transactions that go to produce income; however, with the exception of the

provision relating to "interest, rent, etc.", there is no real attempt to define the term "income." It might be argued that the section uses income to mean profit. Whether it does or not, at any rate, it may be concluded that with the above mentioned exception, there is nothing to prevent the general definition of income from applying. It has already been seen that under this definition an annuity payment consisting of a definite sum does not constitute income.

As has been stated, one of the annuity contracts provides for annual interest payments. In our opinion, such a payment is subject to the income tax, since the statute specifically included interest within the meaning of gross income.

The cases which we have been able to find concerning the applicability of income taxes to annuity payments are hardly in point for the reason that they arise under statutes relating specifically to annuities. (See *Bacon vs. Commissioner of Corp.*, (Mass.) 165 N. E. 664; 99 A. L. R. 624.) The Federal Income Tax Act also contains a provision taxing annuity contracts. (26 U. S. C. A. 22 (2).)

Of course payments under the contracts which actually represent a profit upon the investment are subject to an income tax. We have no such situation here, however.

SUBJECT: INCOME TAX; DEDUCTION BY PURCHASER OF SALES TAXES PAID
FROM GROSS INCOME

12 March, 1937.

Question has arisen whether or not in computing the net income for income tax purposes the purchaser should deduct the amount of sales taxes paid during the income year. It is the opinion of this Department that this question must be answered in the negative.

Section 322, clause 4, of Chapter 371 Public Laws 1935, lists as one of the deductions to be allowed, in computing net incomes, the item of:

"Taxes paid or accrued during the income year, except Federal and State income taxes, taxes levied under Section 311½ of this act, inheritance and estate taxes, and taxes assessed for local benefit of a kind tending to increase the value of the property assessed."

However, it appears that the purchaser who, it is true, ultimately pays the sales tax, cannot avail himself of this deduction in so far as sales taxes are concerned, for the reason that the sales tax is not imposed upon the purchaser but is expressly levied as a privilege tax for engaging in the business of merchandising.

Section 401 of the Revenue Act provides, in relation to the sales tax, that:

"The tax upon the retail sale of merchandise to persons in this State is levied as a license or privilege tax for engaging or continuing in the business of merchandising as defined in this Act, but merchants may add to the price of merchandise the amount of the tax on the sale there, and when so added shall constitute a part of such price, shall be a debt purchaser to merchant until paid, and shall be recoverable at law in the same manner as other debts. It is the purpose and intent of this act that the tax levied hereunder shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant."

Although the Emergency Sales Tax Act contemplates passing the tax on to the purchaser, nevertheless, it is the opinion of this office that the tax is levied upon the merchant and not upon the consumer, and that the merchant is not merely agent for the State to collect the tax upon the purchaser. Nor do we regard the levy and collection of this tax as a matter of quasi garnishment. Since, therefore, it appears that the sales tax is imposed upon the merchant, we believe that the purchaser could not be allowed to deduct sales taxes from his taxable net income.

This exact question has been ruled upon in the case of *Shearer vs. The Commissioner of Internal Revenue*, 48 Fed. 2d., 552, in which it was held:

"That an excise tax on the sale of a motor car being imposed on the dealer, the purchaser cannot deduct the amount thereof charged against him separately from the purchase price, from his taxable income."

SUBJECT: INHERITANCE TAX; JOSEPH HALBERSTADT, BEAUFORT COUNTY

18 March, 1937.

In this case the decedent was a resident of North Carolina, dying testate and leaving a wife and one daughter. The daughter and a partner in business at that time resided in another State, and were made the Executors of the Will. It is stated in your letter that the decedent had a proprietorship in North Carolina and a one-half partnership interest in a business in another State.

Under the Will, the wife received that part of the estate located in North Carolina and about \$12,000.00 in insurance. The daughter received property located outside of North Carolina and insurance amounting to about \$21,000.00. The partner referred to received about \$18,000.00 in insurance, the latter being a partnership policy and the premiums paid out of the profits of the partnership business.

The contention is made by the attorney for the estate that the State can tax only that part of the estate located in North Carolina which goes to the wife and the insurance received by the wife; it is contended that the insurance payable to the daughter and to the partner cannot be taxed for inheritance. The Insurance Companies which issued the policies are non-resident.

It will be seen that there is no contention as to the inheritance tax with respect to benefits received by the wife.

Upon the above facts, it is my opinion that the North Carolina inheritance tax will apply to the proceeds of insurance going both to the daughter and to the partner.

Of course, the place of residence of the Insurance Company is irrelevant; I assume that the contention of non-liability is based upon the non-residence of the daughter and the partner.

But the proceeds of the insurance policies were passed to the daughter and the partner by the will of the decedent dying a resident of this State, in which State, of course, the will was probated, and the bequest consists of intangibles subject to the transfer or inheritance tax in the State of decedent's domicile. *Blodgett v. Silberman*, 48 S. Ct. 410; *In re: Morris*, 138 N. C., 259; *State vs. Scales*, 172 N. C., 915, etc.

RE: INCOME TAX—CAESAR CONE

19 March, 1937.

I have before me the matter of income tax deficiency on the return of Mr. Caesar Cone, with request that I review the matter and write you my conclusion thereupon.

The inquiry relates to the following points:

First: Whether or not all income taxes paid by the taxpayer, except Federal income taxes and income taxes paid the State of North Carolina, may be deducted from the net income under paragraph 4 of Section 322 relating to deductions.

Second: Whether or not in determining the amount of deductions for charitable gifts the entire net income taxable in this State shall be made the basis of the fifteen per cent allowable deduction.

1. As to the first question, I cannot concede that it was the intention of the Act to permit the deduction from net income of taxes levied in another State. There is no reason why this jurisdiction should permit the deduction of taxes levied in another State, which have no relation to any burden placed upon the taxpayer for the support of this State Government.

It is contended that only North Carolina State taxes are meant to be included within the exception, relating to deductible items, in paragraph 4, and that taxes of other states are, therefore, deductible. This seems to be made on the rather narrow ground that a capital "S" is used in the word "State" instead of a lower case letter. This is plausible only because such use of capital letters is ordinary in such matters. The suggestion completely loses its force, it seems to me, when we read *in pari materia* with this section the same word,—“State,”—in Section 10, where it is twice used with a capital “S” in relation to “another State.”

I can see no substantial reason why the taxes of other States should be permitted as deductible items, and many reasons why that should not be done, and I must hold that it was the intention of the Act not to permit deduction of such items.

As for the protection afforded to the taxpayer by the laws of another State when resident individuals and domestic corporations are taxed upon a certain portion of the income derived from business or investments in another State, that is sufficiently taken care of in Section 10, because the net income from such business or investment in another State may be deducted from the income in this State when the other State levies a tax thereupon.

2. In my judgment, the law intends to permit a deduction for charitable contributions up to fifteen per cent (I refer to the 1933 law) upon all net income taxable in this State, except as this may be affected by Section 311½.

This section makes an apparent exception in the treatment of income from stock in foreign corporations, expressly providing that there shall be no deduction from such income in computing the tax except such as is provided in the section itself, which does not mention any deduction for charitable contributions. I think, therefore, it is plain that in computing the allowance for charitable contributions the income from stock in foreign corporations is not intended to be included.

SUBJECT: REVENUE ACT, SCHEDULE H, ARTICLE VIII; TAX ON INTANGIBLES;
STATUS OF MONEY IN BANK AS TO LOCAL TAXATION FOR 1937

13 April, 1937.

Under Article VIII, Schedule H of the Revenue Act, relating to taxation of intangible personal property, the opening section 700 reads, in part:

"Intangible personal properties defined and classified by this chapter, with the exceptions hereinafter made, are hereby segregated for exclusive State taxation after the year one thousand nine hundred thirty-seven and at the same time stated in this article and shall be taxed as hereinafter provided. Nothing herein contained shall affect the taxability of those subjects of taxation in the year one thousand nine hundred thirty-seven nor the listing of same for the year one thousand nine hundred thirty-seven in the manner provided in the Machinery Act."

Relative provisions are placed in the Machinery Act which control local listing and taxation of intangibles, Sections 304, 803, 908, and 1006 reading as follows:

"None of the provisions contained in any of the sections of this article to conflict with Article VIII, Schedule H of the Revenue Act, but rather shall they be subordinate thereto."

Historically, from the debates in the General Assembly and the discussion of these acts,—the Machinery Act and the current Revenue Act,—in the committees, it was intended that the counties should enjoy in full the taxation of all intangibles listed in the Revenue Act for another year, just as heretofore; and that after the year 1937 the intangibles would be exclusively taxed by the State for school purposes, as provided in Section 700.

I think this intention has been adequately carried out by the two Acts considered together.

It has been suggested with reference to the taxation of bank deposits provided in the Revenue Act, Section 701, that the following clause is susceptible to a different interpretation:

"The taxes assessed upon bank deposits in this section shall be paid by the cashier, secretary, treasurer or other officer or officers of every such commercial, industrial, savings bank, trust company or other corporation doing a banking business by report and payment to the State Department of Revenue on March fifteenth, one thousand nine hundred thirty-eight, *for the previous calendar year and annually thereafter.*"

It is suggested that the use of the phrase "for the previous calendar year" in some way differentiates the particular intangibles referred to in 701 from those described in 702, 703, 704, 705, and 706; and that bank deposits thereby should be held to constitute an exception referred to in Section 700, reading in part:

"Intangible personal properties defined and classified by this chapter, with the exceptions hereinafter made"

And it is further suggested that, under the operation of the Revenue Act to which the Machinery Act is subordinated by the provision above referred to, bank deposits are not subject to local taxation for the present calendar year.

In my opinion, this is entirely untenable. If 701 makes any exception

with regard to bank deposits, it is obviously not such an exception as would give such deposits the benefit of the indemnity against local taxation.

The proposition laid down in Section 700, to which exceptions are in the body of the Act made, is simply this: "Intangible properties defined and classified by this chapter are hereby segregated for *exclusive* State taxation after the year one thousand nine hundred and thirty-seven," and that would logically mean that bank deposits not only are not presently so segregated, but will not be so segregated after the year 1937. There is no more intention that bank deposits should be exclusively segregated for State taxation during this year so as to except them from local taxation than there is that they should be subject to local taxation in subsequent years.

The apparent difficulty in construction of the Revenue Act relating to bank deposits arises out of the fact that the law for obvious reasons provides for the taxation of an average of credit balances existing on the 15th day of September, December, March and June in the calendar year, rather than placing the tax upon the balance in bank upon any particular day, and requires the tax to be deducted by the bank out of the account of the taxpayer and paid by the bank to the State Department of Revenue.

The expression "for the previous calendar year" used in the quoted paragraph, if it has any significance at all, must refer principally to the report of the average obtained from these balances running over the calendar year.

As used with reference to a property tax, such expressions as "for the calendar year," "for the fiscal year," "for the year," have little significance, and certainly no technical meaning outside of the context in which they are used. The property tax is a visitatorial tax, and its payment confers no privilege whatever upon the owner of the property which could be measured by a space or period of time. At any rate, whether "paid for the previous calendar year" or any other preceding year, it is plain from the statute that the tax must be paid on March 15, 1938, and no administrative difficulty whatever will arise so far as the Revenue Act is concerned; and I do not think under the exception here rendered there has been placed any restriction as to local taxation under the Machinery Act for 1937. In my opinion, a complete uniformity exists as to all of the intangibles listed under Schedule H, both with reference to liability for the State tax payable March 15, 1938, and with reference to the liability for local taxation for this year.

TAXATION—INHERITANCE—SURVIVORSHIP—JOINT TENANCIES

15 April, 1937.

My attention has been called to several letters reaching your Department and mine in relation to the subject of survivorship in personal property and its relation to the inheritance tax, and it is suggested by Mr. Moore that still considerable confusion exists in the matter and that some of the letters written from this office on various aspects of the case have been misunderstood and, in fact, are being used as a basis for devices or schemes to avoid the inheritance tax assessed on succession to personalty.

As our letters are in answer to specific inquiries from your Department,

and are based entirely on the fact situation presented in those inquiries, it is obvious that frequently the letters themselves cannot be understood without reading the letter of inquiry. As far as possible, at least in important matters, we have endeavored to outline the inquiry succinctly but, of course, it is not practicable to quote the inquiries in full in connection with our answer.

Today our attention is called to a letter of April 8th received by you from Mr. John D. Smyers, of the Editorial Department of Prentice-Hall, Inc., upon the question of inheritance taxes, citing the opinion of the Attorney General of September 16, 1935. We quote from this letter, in part:

"We understand that joint estates no longer exist in North Carolina, and that the section of the inheritance tax statute applying to tenancy by the entirety does not apply to joint tenancy. (Opinion of Attorney General, Sept. 16, 1935.)"

Consolidated Statutes of North Carolina, Section 1735, abolishes survivorship in joint tenancy, except in a limited way to partnership. See letter of Attorney General 18th of December, 1936. Therefore, upon any estate, real or personal, held in such joint tenancy, the succession tax is leviable, as the statute plainly states that such property "shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common."

In the case of partnership after the surviving partner has been accorded the legal right to have partnership debts satisfied out of the partnership funds, these descend or are distributed in the same manner and are subject to the tax.

However, C. S. 1735 does not operate to prohibit a valid agreement relating to survivorship in personal property. See letter of Attorney General August 15, 1936; *Taylor vs. Smith*, 116 N. C. 531; letter of Attorney General 12th of April, 1937. It is to be observed here that we are dealing with the general proposition of law and not the factual situation which might be presented in any case. Take for example a joint bank account. In my opinion the fact that the account was in the name of more than one person, or that more than one person had a right to check upon the account, while the bank might be protected in honoring the draft of the survivor, this has nothing whatever to do with the real facts in the case and as to whether or not under the law, and with reference to the inheritance tax, there is actually a right of survivorship. This would depend upon the contract between the parties.

I have to say further with regard to this situation that in my opinion any agreement made between the parties whereby one may, in the event of death, succeed to an interest in the estate belonging to the other would present a taxable situation as to that part of the estate or of the funds representing the interest of the deceased person.

As to the letter of September 16, 1935, it may be understood by a reference to Section 1, subsection 7 of Chapter 445, Public Laws 1933, referring to inheritance tax upon estates held by entirety, it is a simple statement that the inheritance tax imposed by Section 7 has no connection with any inheritance or succession tax upon personalty, as in this State there is no estate by entirety in personal property. This letter does not

purport to relieve personal property to which a person has succeeded by way of survivorship from inheritance or succession tax in such instances as it may be subject thereto under the law.

SUBJECT: INCOME TAX; EXEMPTIONS; CURRENT REVENUE ACT, SECTION 324—RE: MRS. JULIA A. SEIGLER

28 April, 1937.

Section 324 of the current Revenue Act provides the following exemptions from income tax of net incomes:

(a) In the case of a single individual, a personal exemption of One Thousand (\$1,000.00) Dollars;

(b) In the case of a married man with a wife living with him, Two Thousand (\$2,000.00) Dollars; "or in the case of a person who is the head of a household and maintains the same and therein supports one or more dependent relatives, Two Thousand (\$2,000.00) Dollars."

There is a further exemption (d) of \$200.00 for each individual dependent (other than husband or wife) who is under eighteen years of age.

The exemption provided for in subsection (d) has no relation to the exemption provided with respect to the head of a household in subsection (b), nor can it be held to qualify the reference to dependent relatives mentioned in subsection (b), so as to require them to be under eighteen years of age. The head of a household is entitled to the \$2,000.00 exemption, provided he or she "maintains the same and therein supports one or more dependent relatives," which must be taken as regardless of age.

In the particular case of Mrs. Julia A. Seigler, it is claimed that she is the head of the household and supports therein dependent relatives. It does not appear that these relatives were under eighteen years of age; but the minority of such relatives is not necessary to entitle Mrs. Seigler to the \$2,000.00 exemption.

It is my opinion that Mrs. Seigler, under the circumstances of this case, if you find the above to be the facts, is entitled to the \$2,000.00 exemption.

SUBJECT: MOTOR VEHICLE LAWS; RECKLESS DRIVING; SPEED RESTRICTIONS

29 April, 1937.

In your letter of April 29 you inquire of this office for a construction of the statutes relative to reckless driving and speed restrictions.

Chapter 311, Public Laws of 1935, amends the old law relative to speed restrictions in this State. Section Two of said Chapter is in part as follows:

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

"(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

"1. Twenty miles per hour in any business district;

"2. Twenty-five miles per hour in any residence district;

"3. Thirty-five miles per hour for motor vehicle designed,

equipped for, or engaged in transporting property; and thirty miles per hour for such motor vehicle to which a trailer is attached;

"4. Forty-five miles per hour under other conditions.

"(c) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

The operation of a motor vehicle at speeds greater than those set out above would, under the law, be prima facie evidence that the speed was unlawful, and that it was neither reasonable nor prudent, and the burden would shift to the defendant to prove to the court that the speed was reasonable and prudent under the circumstances then existing and therefore lawful.

We are of the opinion that where no special hazard exists it would be entirely possible that a motor vehicle could be driven legally at a rate in excess of the limits set out above. As stated before, however, the burden would be upon the defendant to show that such a greater speed was reasonable and prudent under all the circumstances existing at that time.

SUBJECT: SECTION 518½, REVENUE ACT; NONRESIDENT MANUFACTURERS
AND WHOLESALE DEALERS TO BE LICENSED

29 April, 1937.

You have submitted to me the question of the constitutional validity of this Section under the Federal and State Constitutions.

The Section requires that from and after April 30, 1937, every nonresident desiring to engage in business of making sales of beverages, described in Section 501 of the Revenue Act, to licensed wholesale dealers, are required to secure from you a permit so to do, and you are authorized to require of every such applicant that a bond in a sum not exceeding \$2,000.00 be given, conditioned as required by this Section. Upon payment of a license tax of \$150.00, you are authorized to issue the permit. Certain requirements are made of the licensed nonresident and for cancellation of the permit upon failure to comply therewith. A resident manufacturer licensed under Section 504, is not required to post bond.

In the case of Premier-Pabst Sales Company vs. Walter T. Grosscup, 298 U. S., 226, 80 L. ed. 1155, the plaintiff attacked the constitutionality of a Pennsylvania statute which imposed a higher rate of tax on distributors who sold beer imported into the State than that imposed upon beer which was manufactured in the State. The court did not consider the question because it was held the plaintiff was without standing to present it. In this connection the court said:

"Under the Act of 1935, no one may sell beer in Pennsylvania unless duly licensed; and no license may issue to a corporation unless all of its officers and directors and fifty per cent of its

stockholders have been residents of the State for a period of at least two years prior to the application for the license. The constitutional validity of that provision is conceded; * * *".

The State concededly having the right to refuse to grant a license or a permit to a nonresident to sell alcoholic beverages within its borders would clearly have the right to permit the nonresident to engage in such business under such conditions and restrictions and upon the payment of such taxes as the State might impose. Under Section 518½, the State in the exercise of this prerogative requires the nonresident distributor to post bond and pay the permit or license fee prescribed by this Section. In order to engage in such business in this State, a nonresident must comply with this Section or be denied the privilege of engaging in that business here.

The constitutional question which was not decided in the Premier-Pabst Sales Company vs. Grosscup, was met and decided by the court in State Board of Equalization of California vs. Young's Market Company, 81 L. ed. 37. In this case, the court considered the California statute which imposed a license fee of \$500.00 for the privilege of importing beer to any place within its borders. It was held that this enactment did not violate the commerce clause of the Federal Constitution nor the equal protection clause of the Fourteenth Amendment in connection with which the court says:

"The classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth Amendment."

Obvious reasons exist for the requirement of Section 518½. The nonresident cannot be reached and dealt with in the same manner as a resident of the State. By reason of nonresidence, the situation as compared with a resident of the State, a reasonable basis for distinction made in the statute is provided. The General Assembly, however, is the final judge of reasonableness of its requirement in this respect and there are no provisions in the Federal Constitution which would deny the right of the State to enact this legislation.

SUBJECT: TAXATION; PRESSING CLUBS, DRY CLEANING ESTABLISHMENTS,
AND LAUNDRIES SOLICITING FROM CCC CAMPS

1 June, 1937.

Your letter of May 26, addressed to Mr. W. A. Baker, Jr., has been referred to this office for reply.

The question arises whether or not persons, firms and corporations operating pressing clubs or dry cleaning establishments, and who solicit such business from CCC Camps, would be subject to the tax against such businesses, under the provisions of section 139 of the 1937 Revenue Act.

The fact that the CCC organization is itself a Federal agency would, in no wise, affect the liability of persons who solicit laundry or pressing business from the payment of the tax prescribed in the section.

SUBJECT: SERVICE OF PROCESS ON NONRESIDENT DEFENDANT; COMMISSIONER
OF REVENUE; PROCESS AGENT; CONSOLIDATED STATUTES 491, (a,b,c.)

1 June, 1937.

The question arises as to whether or not under Consolidated Statutes

491 (a), wherein provision is made for service of process upon nonresident drivers of motor vehicles in actions growing out of any accident or collision, in which such nonresident may be involved by reason of the operation by him of the motor vehicle on the highways of this State, the fee of \$1.00 therein provided for shall be collected from the plaintiff in such an action in cases where the suit is brought in forma pauperis.

The fee of \$1.00 provided for in this Section is to reimburse the State Revenue Department for any expenditure of funds which may be required in order to carry out the provisions of the Act. Certainly no funds belonging to the Revenue Department could legally be expended for this purpose.

We are of the opinion that the provisions of Consolidated Statutes 493, and following, which relate to suits in forma pauperis, and the provisions of Consolidated Statutes 1247, which prohibit an officer to require a fee of any person who sues as a pauper, have no application to the provisions of Section 491 (a,b,c), and that the Commissioner of Revenue would not be required to comply with the provisions of this statute unless and until there had been deposited with him the fees therein prescribed.

This office has formerly held that a fee of \$1.00 should be collected for each defendant named in the action, and if the alternative method is used, as set out in Section 491 (c), in addition to the \$1.00 fee prescribed in C. S. 491 (a), the plaintiff in such an action should file with the Commissioner of Revenue at least \$5.00 for each nonresident defendant, which fee shall be forwarded by the Commissioner of Revenue to the process officer in the State in which the defendant resides.

SUBJECT: REVENUE ACT; SECRECY REQUIRED OF OFFICIALS; TAX RETURNS

2 June, 1937.

Section 828 of the Revenue Act relates to the secrecy required of the Revenue Department as to income taxes, taxes paid under Schedule B, and persons liable therefor.

The 1937 Revenue Act very considerably relaxes the rules of secrecy required of the Revenue Department, and officials connected therewith, in regard to information concerning income taxes and taxes under Schedule B; but, still, the information which may be given out by the Department is considerably restricted. The inquiry here is as to whether employees of the Revenue Department may, under the present provision of the Act, supply inquirers with lists or information as to those liable for Schedule B taxes and those who have paid Schedule B taxes.

A reading of the law itself will disclose to what extent may be given, by whom it may be given, and to whom.

Section 828 (b) provides as follows:

"Nothing in this Section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, or their duly authorized representative; or the inspection by a legal representative of the State of the report or return of any taxpayer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this Act;

nor shall the provisions of this section prohibit the Department of Revenue furnishing information to other governmental agencies, of persons and firms properly licensed under Schedule B of this Act. The Department of Revenue may exchange information with the officers of organized associations of taxpayers under Schedule B of this Act with respect to parties liable for such taxes and as to parties who have paid such license taxes."

This inquiry relates to the last sentence of the above subsection.

Analyzing the provisions of this section in the respect mentioned, I am of the opinion that the law contemplates (a) that such information may be given by the Commissioner of Revenue in his official capacity, and not by employees of the Department unless the latter are directed or permitted by the Commissioner of Revenue to do so, under his authority, and (b) that such information may be given only to "officers of organized associations of taxpayers under Schedule B," and may not be given to inquirers generally who do not fall within such classification.

The law clearly does not contemplate the furnishing of lists, or of other information, to individuals who are not "officers of organized associations of taxpayers."

SUBJECT: INCOME TAX; SALARIES OF EMPLOYEES OF NATIONAL BANKS

8 June, 1937.

You submit to this office a letter from Mr. Scovill Wannamaker, Cashier of the Depositors National Bank of Durham, wherein he inquires if employees of National Banks are employees of such Federal instrumentalities that they are not required to report salaries from such instrumentalities in their gross income for income tax purposes.

Consolidated Statutes 7880 (135) states that gross income does not include "salaries, wages, or other compensation received from the United States by officials and employees thereof." The policy of the Department has been to apply the above statute in all those cases where the salaries are paid directly by the Federal Government. Hence, salaries of employees of Federal Reserve Banks or the Reconstruction Finance Corporation, since paid directly by the Federal Government, would not be included in gross income for tax purposes. But, we are of the opinion that the salaries of employees of National Banks should be included in gross income for tax purposes, because those salaries are paid by the Banks and not directly by the Government. This interpretation is a strict one against the taxpayer; but, since the statute involves an exemption, such an interpretation is correct.

National Banks are Federal institutions, in accordance with the principle that a state has no power to tax such Federal instrumentality, except as permitted by Congressional Act. (First Nat. Bank vs. Hartford, 273 U. S. 548; Des Moines Bank vs. Fairweather, 263 U. S. 103; see 61 C. J., page 281.)

Yet, National Banks are "private institutions and do not constitute part of any branch of the National Government." (7 C. J. 758.)

It does not seem imperative that employees of all Federal instrumentalities come under the exemption of C. S. 7880 (135), because such employees are not necessarily employees of the United States. Especially is

this true of National Banks, which are private institutions, and which directly pay the salaries of their employees and control said employees entirely independently of the United States.

SUBJECT: SCHEDULE "B" LICENSE TAX; SECTION 122, CONTRACTORS AND
CONSTRUCTION COMPANIES

8 June, 1937.

You state that a large corporation in this State does quite a bit of construction work for itself, and in the course of its construction maintains the year around a full crew of laborers under the supervision and control of a full-time Superintendent, which organization constructs all projects for this Company. Not only in this organization are there architects, but electricians, plumbers, and steam fitters and other persons who are ordinarily taxed under the provisions of the Revenue Act. You inquire if the Head of this organization, as well as the employees enumerated above, would be subject to the privilege tax imposed under Section 122, Section 109, or Section 155.

From a very careful consideration of Section 122, current Revenue Act, we are of the opinion that the whole Section should be considered in order to arrive at the intent of the Legislature in levying a tax thereunder. Subsection (a) of said Section provides that every person, firm, or corporation, who for a fixed price, commission, fee, or wage offers or bids to construct within the State of North Carolina any project therein enumerated, shall pay the tax therein specified.

In Subsection (b) it is provided that in addition to the tax levied in Subsection (a) of the Section, every person, firm, or corporation, who for a fixed price, commission, fee, or wage undertakes or executes a contract for the construction, or who superintends the construction of the projects enumerated in Subsection (a), shall before or at the time of entering into such projects, and/or such contracts, apply for and procure a license for engaging in such business, and pay for the same the tax according to the schedule therein set forth.

It is apparent to us that persons so engaged in the manner outlined above are merely employees of a Company in the construction of its own private enterprise; that they are not holding themselves out to the public as engaged in the trades or professions taxed in the Revenue Act, and would not, therefore, be subject to the tax.

With particular reference to Section 122, it will be noted that the bidder's tax under Subsection (a) must be procured at the time of, or prior to, offering or submitting any bid on the projects therein enumerated. Under Subsection (b) the license must be procured before or at the time of entering into such projects, and/or such contracts, and the tax is based, under this Subsection, upon the estimated cost of such project. Obviously, it would be impossible to apply the tax under Subsection (a) because such employees do not offer bids upon the projects therein enumerated, nor under Subsection (b) do such employees receive compensation for their employment according to the amount of the project to be constructed.

We are of the opinion that the license tax levied under Schedule "B," and particularly the Sections enumerated in your letter of June 1, were

levied by the General Assembly upon persons engaged in such trades or professions, and who hold themselves out to the public for employment as such, and that the Legislature did not intend to apply such tax to regularly salaried employees employed upon a full-time basis, and as an incident to such employment, perform services such as are described in the taxing sections.

SUBJECT: INCOME TAX—BUCKEYE COTTON OIL CO.; APPLICATION OF
STATUTORY FORMULA

11 June, 1937.

From the letter the Buckeye Cotton Oil Company addressed to the Department of Revenue, it appears that this Corporation owns and operates thirteen cotton seed product mills in eight states and a paper pulp and soya bean mill in Tennessee and Kentucky. This Company maintains a system of accounts whereby reports are furnished that reflect accurately the loss of earnings of each of these separate plants in the several states in which they are operated.

It is further stated that general overhead expenses are allocated to the various mills on the basis of their proportion of the total crush of seed of all mills. This Company contends that due to the fact that this separate accounting method is in effect in the operation of all of their plants, it should be allowed to report its income on the basis of the actual income segregated by such method to the State of North Carolina for the plant which it operates in this State.

This office has uniformly held that income tax must be computed according to the formula appearing in the statute, and we see no reason why an exception should be made in this case.

SUBJECT: WINE TAX; WINES FOR SACRAMENTAL PURPOSES

11 June, 1937.

You submit to this office a letter addressed to you from Mr. J. E. Peyser, Western Counsel for the Wine Institute, wherein certain inquiries are made concerning the liability for tax upon persons, firms, or corporations who ship sacramental wines into this State direct to clergymen and religious organizations.

Consolidated Statutes 3411 (t) provides that "it shall be lawful for any ordained minister of the gospel who is in charge of a church and at the head of a congregation in this State to receive in the space of ninety consecutive days a quantity of vinous liquor not greater than five gallons, for use in sacramental purposes only, and it shall be lawful for him to receive same in one or more packages or one or more receptacles."

We are of the opinion that a wine shipper in California could legally ship sacramental wines within the meaning of the statute above quoted direct to clergymen in this State in the quantity and during the specified time therein set forth.

We are advised that the Federal Government requires a special permit of the shipper who desires to ship sacramental wines. The State does not require any such permit. Wines shipped for such purposes would not be subject to tax by the State.

SUBJECT: SECTION 139, SCHEDULE "B" LICENSE TAX; LAUNDRIES AND
PRESSING CLUBS

18 June, 1937.

Section 100, Subsection (c) of the 1937 Revenue Act, provides in effect that the State license obtained under the provisions of the Act constitutes a personal privilege to conduct the business named in the State license, and that it shall be construed to limit the person, firm, or corporation named in the license to conducting the business and exercising the privilege named in the State license to the county and/or city and location specified in said license, unless otherwise provided in the article or schedule.

Section 139, which levies a license on pressing clubs and dry cleaning plants, Subsection (b), is as follows:

"Cities and towns, respectively, may levy a license tax not in excess of that levied by the State."

No provision is made for counties to levy a tax under this Section, and we, therefore, are of the opinion that every person, firm, or corporation who has secured from the State, and from the city or town, the proper license to engage in this business would not be liable to a county license, because there is no provision appearing in the Section which would permit the county to levy such a tax. That is to say, nothing appearing in the Section which would permit the county to levy a tax, such person, firm, or corporation holding proper licenses from the State, city, or town has secured the privilege by the payment of such tax to engage in such business, it not being "otherwise provided in the Article" that the county may levy a tax for the privilege of engaging in such business. There is no basic authority for counties to levy a privilege tax, and in the absence of such authority in the Revenue Act, the county could not levy such a tax.

SUBJECT: SCHEDULE "B" LICENSE TAX; SECTION 119, CURRENT REVENUE ACT

13 July, 1937.

The question has arisen as to whether gas companies who sell gas refrigerators are subject to the tax levied under Section 119, of the Revenue Act.

This Section is in part as follows:

"Every person, firm, or corporation engaged in the business of selling and/or delivering and/or renting cash registers, . . . kelvinators, frigidares, or other refrigerating machines . . ."

A tax is levied for the privilege of engaging in such business in the amount of \$10.00. Even though it is true that a gas refrigerator has no moving parts, nevertheless, we are of the opinion that it is a refrigerating machine or apparatus, and that the Legislature intended to tax persons engaged in the business of selling such a machine, and that this class of operation comes within the meaning of Section 119, above referred to.

SUBJECT: INCOME TAX; DEDUCTIONS

13 July, 1937.

This office is of the opinion that expenses incurred by physicians in attending medical meetings are not allowable deductions for income tax purposes.

SUBJECT: INHERITANCE TAX; EXEMPTION OF WAR RISK INSURANCE

5 August, 1937.

You inquire whether or not moneys constituting the proceeds of Government insurance, and held by an administrator in a bank, are subject to State inheritance tax.

38 U. S. C. A., section 454, provides that insurance paid to war veterans "shall be exempt from all taxation." In the recent case of *Lawrence v. Shaw*, 57 Sup. Ct., 443, it was held that such funds are exempt, even where they have been deposited by the veteran in a bank.

We are of the opinion, however, that bonds of this nature may be considered in measuring an inheritance tax due upon an estate. It is now well settled that the State inheritance tax does not constitute a tax upon the property transferred to the beneficiary, but rather is a tax upon the right of succession. In *Plumer vs. Coler*, 44 L. ed., 998, it was held that such a tax could be measured by tax exempt government bonds.

SUBJECT: TAXATION; INTOXICATING LIQUOR

12 August, 1937.

You state that several county liquor stores over the State use various methods of computing the seven per cent tax levied under Section 519½ upon distilled liquors; and you further state that the State Alcoholic Board of Control has ruled, under authority of Section (4)-c of Chapter 49, Public Laws of 1937, that the tax on spiritous liquors cannot be added to the retail price thereon and thereby passed on to the consumer. To the end that there may be a uniform method of computing this tax, you ask this office for an interpretation of Section 519½ of the Revenue Act.

The first sentence in this Section is as follows:

"In addition to other taxes levied in this article, and in lieu of taxes levied in Schedule E of this Act on the sale of spirituous liquors, there is hereby levied a tax of seven (7%) per cent on the retail price of distilled liquors of every kind that may be sold in this State, including liquors sold in county liquor stores."

The language of this portion of the statute is very plain. We can give it but one interpretation, and that is that the seven per cent tax must be computed upon the retail price at which such whiskey is actually purchased by the consumer. The retail price of the liquor having been fixed by the State Alcoholic Board of Control, this figure must be used as a basis for computing the seven per cent tax on the retail sale of the merchandise.

UNIFORM DRIVERS LICENSE LAW; REVOKING LICENSE FOR HIT AND RUN
DRIVING, PROPERTY DAMAGES ONLY

23 August, 1937.

We have very carefully considered the letter of Mr. King relative to the authority of the Department to revoke a driver's license where a person has been convicted of hit and run driving and where property damage only resulted from the accident.

From Mr. King's letter, it is apparent to us that the defendant was

found guilty of failing to stop and render aid following an automobile accident. Section 128 of the 1937 Motor Vehicle Act specifically requires the driver of any vehicle involved in an accident resulting in damage to property to immediately stop such vehicle at the scene of such accident, and any person violating this provision is punishable under Section 142 of the same Act.

We are of the opinion that the Department correctly revoked the driver's license of this person under the provisions of Section 12 (a-4), Chapter 52, Public Laws of 1935.

SUBJECT: CORRECTIONS AND CHANGES IN INCOME TAX RETURNS;
ADDITIONAL TAX

25 August, 1937.

We have before us the letter of Prentice-Hall, Inc., of August 16, 1937, asking for an interpretation of Section 335 of the Revenue Act of 1935, the particular inquiry being addressed to the meaning of the term "return" as contained therein.

As you are aware, our Revenue Laws are enacted at every regular session of the General Assembly. Sections 334 and 335, both in the 1933 and 1935 Acts, are obsolete, except as to those cases actually pending under them, if any. Corresponding Sections of the 1937 Act are now in effect.

The provisions of Sections 334 and 335 of the Revenue Act of 1937 must be considered together. We advise that it is the duty, under this law, for every taxpayer promptly to notify the Commissioner of Revenue of any change made by the Commissioner of Internal Revenue in the imposition of the Federal Tax. If he fails to notify the Commissioner of Revenue of such change the three-year statute will not apply, although three years may have elapsed after the additional tax was imposed by the Federal authorities.

Also, notwithstanding three years may have elapsed since the original return before the Commissioner may have an opportunity by virtue of the taxpayer's report of change to act upon the matter, such three years' limitation will not apply in that case, but to all intents and purposes such change will be considered to constitute a return of the taxpayer, upon which the Commissioner is authorized to act within three years of such reported change.

SUBJECT: SCRAP TOBACCO TAX; DUPLICATE LICENSES

30 August, 1937.

Chapter 414, Public Laws of 1937, provides that persons, firms, or corporations desiring to engage in the business of buying and/or selling scrap tobacco, shall pay an annual license tax of \$1,000.00 for each and every county in North Carolina in which the applicant proposes to engage in such business.

Section 3 thereof provides, in effect, that the license so issued "shall be displayed in a conspicuous place in the office or warehouse or place of business of the applicant, and if there be no office or fixed place of business, the person, partner, or representative of the corporation, (if incorporated), engaged in such business, shall carry on his person such license, or a dupli-

cate thereof, . ." to be exhibited upon request of any proper officer or person from whom the tobacco is bought.

The duplicate referred to may be secured by the payment of an additional license tax of \$5.00.

We construe this Section to mean that the duplicate referred to is a duplicate of the original license issued to the person or corporation who has made application for a license to engage in this class of business, and that such a duplicate may be issued to each bona fide agent of such applicant upon the payment of the additional \$5.00 license tax, regardless of whether or not he is an agent of a person, partnership, or corporation.

We call your attention to the fact that this \$1,000.00 tax is not a State-wide license tax, but is levied for each county in which the applicant proposes to do business.

SUBJECT: MOTOR VEHICLE LAWS; DEFINITION OF THE TERM "HIGHWAY"

3 September, 1937.

You inquire as to the liability for additional taxes for overloading of trucks upon roads which are closed and in the course of construction by contractors, when the trucks so used do not, while they are so overloaded, touch upon the highways of the State which are open to the public.

Under the 1937 Motor Vehicle Act, the term "street" or "highway" is declared to be "the entire width between property lines of every way or place of whatever nature, when any part thereof is open to the public as a matter of right for the purposes of vehicular traffic."

We are advised that under the terms of the contracts between the State and the various contractors who are constructing and/or repairing roads, that when such portions thereof have been closed to the public, that such contractors are liable to the State for the condition thereof at the time it is opened to the public for use.

We are of the opinion that there would be no liability for additional tax for overloading on that portion of the road which has been closed off and is not open to the public for vehicular traffic.

SUBJECT: INCOME TAX—J. H. BEALL; DEDUCTIONS

20 September, 1937.

The taxpayer, in this instance, claims as a deduction from gross income his proportionate share in a loss incurred by an estate under the terms of the trust, from which he was entitled to a distributable share. He bases his contention upon Section 318-4 of the Revenue Act which, in effect, provides that every individual who is the beneficiary of an estate or trust shall include in his gross income the distributive share of the net income of the estate or trust received by him, or distributable to him during the income year.

The taxpayer, in cases of this nature, pays an income tax only upon that income which he actually receives from such an estate or trust. Certainly such taxpayer could not take as a deduction from his gross income his distributive share of the estate which was not paid him because the estate suffered a loss during the income tax year.

We do not think that the Section of the law above referred to has any application to a situation of this nature, and that the taxpayer is not entitled to the deduction claimed.

SUBJECT: REVENUE ACT OF 1937; WHOLESALE TAX ON PROCESSORS
SELLING TO RETAIL AND WHOLESALE MERCHANTS

24 September, 1937.

I have your letter of September 23rd, attaching thereto correspondence with Armour & Company. This refers to exemption claimed by this taxpayer under Section 406(a) of the Emergency Revenue Act of 1937. The correspondence discloses that Armour & Company is a processor or manufacturer of meat products, which products are distributed by them to retail and wholesale merchants from various distributing points maintained by Armour & Company in this State. The products themselves are manufactured or processed outside of the State of North Carolina and shipped here for distribution.

Armour & Company concede their tax liability for retail sales tax on sales made to consumers. It is contended that they are not liable for the retail or wholesale tax on sales of their own manufactured or processed products sold by them to retail or wholesale merchants for resale.

In my opinion, this contention of Armour & Company is correct. Under Section 406 of the Revenue Act, it is provided in part as follows:

"Sec. 406. Exemptions.

The taxes imposed in this article shall not apply to the following:

(a) It is not the purpose of this article to impose a tax upon the business of producing, manufacturing, mixing, blending, or processing any articles of commerce, or upon the sale of such articles of commerce by any one who engages in the business of producing, manufacturing, mixing, blending, or processing, when such articles are sold to a manufacturer or producer, or to a wholesale or retail merchant as defined in this article."

There are no other provisions in the Act which would tend to change this exemption.

SUBJECT: SECTION 106, REVENUE ACT OF 1937; CIRCUSES, ETC.

19 October, 1937.

You have verbally requested a ruling from this office as to your authority under Section 106 of the Revenue Act of 1937, imposing a license tax on circuses, menageries, wild west shows, dog and/or pony shows. The question submitted is as to whether or not you have the right to refuse to collect the tax on such an amusement which may be exhibited on Sunday.

Under this section, every person, etc., engaged in the business of exhibiting such performances must apply for and obtain a State license from the Commissioner of Revenue for the privilege of engaging in such business, and pay for such license a schedule tax for each day or part of day. Under Section (d) of the Act, it is required that not less than five days before entering the State such exhibitors are required to file a statement with you, under oath, setting out the information required by you cover-

ing the places in which performances are to be given and other information designated by the Act, which does not include the day on which the performances are to be given. Before the performances can be given, the amount of the determined tax must be paid by the exhibitor. In issuing a receipt for the tax, you cannot presume that the privilege granted will be unlawfully used.

The only General Sunday Law in effect in this State is Consolidated Statutes 3955, which makes it unlawful for any person to engage in his usual business or calling on Sunday, and fixes a penalty of One Dollar for the violation thereof. Throughout the State there are various local Acts dealing with the exhibiting of this type of amusement, and there are in various cities municipal ordinances with respect thereto.

Under the Revenue Act, which is administered by your Department, no provision is made with respect to granting or withholding of a license for a trade, occupation or profession which is to be conducted on Sunday.

It is my opinion that you should collect the tax in the event that a performance is given on Sunday, but the fact that you collected the tax would not authorize the exhibitor to put on the show in violation of any law in force in this State. In the event there was a violation of any local statute or municipal ordinance, it would be a matter for the local authorities to deal with with respect to such law. In other words, it is my opinion that no authority is committed to you by law with respect to enforcing or dealing with any violations of Sunday Laws, and that it is your duty to collect the taxes imposed by the Revenue Act on persons subject to the tax, leaving any violations of law as to the manner and time of performance of such acts to those officials charged with the duty of enforcing the criminal laws.

SUBJECT: SALES TAX EXEMPTIONS; PRODUCTS OF FARMS

25 October, 1937.

You have submitted to me a question as to whether or not trees, plants and shrubs grown by nurserymen and sold by the producers in their original state, are exempt from taxation under the Emergency Revenue Act of 1937, and particularly Section 406 of this Act.

In Section 406, it is provided in part as follows:

“* * * the sale of products of farms, forests, mines, and waters, when such sales are made by the producers in their original or unmanufactured state, shall be exempt from the tax levied in this Article.”

The question, therefore, is whether or not nursery stock produced and sold by a nurseryman on land in this State is to be regarded as a product of a farm within the meaning and definition of this section. This question has been fully considered and authorities bearing upon it carefully examined. We have had the benefit of a brief filed by counsel representing two nurserymen, who also made an oral argument before me.

Without giving you citations of the various cases relating to the subject, which at this time it is perhaps unnecessary to do, I am of the opinion that nursery stock grown and sold on considerable bodies or tracts of land,

would be considered as the products of farms; and when sold in their original state, would be exempt from taxation under the Emergency Revenue Act of 1937 when sold by the producer.

SUBJECT: INCOME TAX; J. A. JONES CONSTRUCTION COMPANY,
CHARLOTTE, N. C.

5 November, 1937.

I note from your inquiry of November 3rd that the J. A. Jones Construction Company, a North Carolina Corporation of Charlotte, N. C., has filed its income reports for the years 1933 and 1934, and omitted therefrom income received from contract with the United States Government in connection with Naval Station and Madden Dam, Canal Zone. This is on the basis that such income is not taxable under the North Carolina Revenue Law.

Of course, it is well considered that an income tax upon the salary or wages received by officers and employees of the United States Government, employed in carrying on some of the functions of government, cannot be imposed, as these are instrumentalities of the government. *McCulloch v. Maryland*, 4 Wheat. 448.

However, when the relation between the taxpayer and the government is purely that of contract, that is to say, where the person or concern is performing a certain piece of work or construction by contract, there is no constitutional objection to the imposition of a net income tax in a State of proper jurisdiction, even though a portion of that income may be derived from profits on the contract with the United States Government. *Baltimore Ship Building and Dry Dock Co. vs. Baltimore*, 195 U. S. 375, 49 L. ed. 342; *Gromer v. Standard Dredging Co.*, 224 U. S., 362, 371, 56 L. ed. 801, 805.

It makes no difference that the income was earned in another State or a foreign jurisdiction, since the basis of the tax is the protection afforded by the laws of the State of residence in its receipt and enjoyment. *Maguire v. Trefry*, 253 U. S., 12, 64 L. ed. 739; *Lawrence v. State Tax Commission*, 280 U. S., 276, 76 L. ed. 1102. *ACL Ry. v. Maxwell*, 207 N. C. 746.

In my judgment, the income tax is properly imposed upon net income, including profits on the operations described in your letters.

SUBJECT: SALES TAX—RE: HIGH HAMPTON, INC.

5 November, 1937.

Meals furnished a guest in a hotel are taxable under the 1937 Act, just as any other commodity sold at retail to a customer. I cannot find anything in the exemptions in Section 406 that could be properly classified so as to extend to meals sold at restaurants or hotels.

The fact that an American Plan hotel may charge a lump sum for meals and lodging and certain other services or privileges might make a difficulty in ascertaining the amount of tax to be imposed; but that method of dealing with the customer does not exempt the meals which are served under that plan from the sales tax.

I assume that by proper administrative regulations a fair method of ascertaining the value of the meal so sold has been adopted.

In my judgment, the imposition of the tax under the circumstances mentioned is proper.

SUBJECT: PRIVILEGE TAX; AUTOMOBILE DEALERS; SECTION 153 OF THE
REVENUE ACT

6 November, 1937.

You inquire if the Revenue Department has authority under the law to require the Motor Vehicle Bureau to refuse to issue Certificates of Title and license plates to applicants who have purchased motor vehicles from dealers who have not paid their privilege license tax to engage in the business of a motor vehicle dealer under the provisions of 153 (4) of the Revenue Act.

Subsection C of 153 (4) provides: "No dealer shall be issued dealer's tags until the license tax levied under this subsection has been paid."

Application for titles to motor vehicles purchased are made by the purchasers thereof, and not by the dealers. There is nothing in the Motor Vehicle Laws, nor the Revenue Act, which would prohibit the issuance of a Certificate of Title to an applicant who is the purchaser of an automobile from a dealer who was delinquent in his privilege license tax. The application is made by the purchaser of the motor vehicle and not by the dealer.

Section 153 (4) C applies only to the application for dealer's tags and not to the purchaser of motor vehicles from dealers. We advise, therefore, that your Department would have no authority to require the Motor Vehicle Bureau to refuse to issue Certificate of Title and license plates to an applicant who has otherwise complied with the law in this regard.

SUBJECT: INCOME TAX; TAX DEDUCTIONS

13 November, 1937.

The taxpayer claims an exemption for money paid into the Federal Treasury to go into a Pension Fund, under the Federal Railroad Pension Act, Subsection 45 U. S. C. A., Section 242-244 (Sup.), which deduction was disallowed by the Department. Later, the Federal law under which the tax was paid to the Federal Government by this taxpayer was declared to be unconstitutional; Railroad Retirement Board v. Alston, 79 L. ed. 1468. As covering the entire matter at issue, I beg to advise:

1. The taxpayer was not permitted to make the deduction under our own Revenue law, which expressly excepts an income tax from permissible deductions; Section 324 (4); and the amount in question was specifically declared by the Federal Act to be income tax. Section 242, Title 45, U. S. C. A.

2. It never was a tax, because the effect of the Supreme Court decision is to render it void, *ab initio*.

3. The Commissioner of Revenue has no authority to adjust our income tax law to fit a situation of this sort, so that the income liability of 1936 may be transferred to the income year 1937.

I am of the opinion, however, that in justice to the taxpayer the amount so returned to him during the income year of 1937 should not be taxed as income of that year, since it is but a return of his capital earned during another year and illegally withheld from him.

SUBJECT: INCOME TAX; DEDUCTIONS

22 November, 1937.

The Federal Excess Profits Tax is levied under the provisions of Section 13 (a), Title 26, U. S. C. A., wherein we find the following language:

"There shall be levied, collected, and paid for each taxable year upon the net income"

From the above, it is apparent that this Excess Profits Tax is an income tax levied in the income tax schedule of the Federal Revenue Act. Therefore, it is not a deductible item under Subsection (4) of Section 322, Revenue Act.

SUBJECT: SALES TAX ALLEGED TO HAVE BEEN ILLEGALLY COLLECTED

2 December, 1937.

In your letter you refer to our ruling of September 24, 1937, which I still think is a correct statement of the law.

However, turning to C. S. 7979 (a), providing for a refund of taxes paid through clerical error, misinterpretation of the law, or other causes, under certain procedure therein set out upon which this taxpayer relies, I have to say that I think the Court has treated this section as permissive only in character and not mandatory. In other words, a discretion is given to the officers named in the section, as to which the courts will not control them; *Bunn v. Maxwell*, 199 N. C., 557. But, referring to section 414 of the sales tax law, it seems to me that it is sufficient to cover this situation and to extend authority to the Commissioner of Revenue to readjust this tax where excessive computation of the tax had been made upon the return of the taxpayer and, in his discretion, refund the tax.

SUBJECT: INCOME TAX; CREDITS; SECTION 325, 1935 REVENUE ACT

2 December, 1937.

Taxpayers are non-resident individuals, carrying on partnership business in this State. They have correctly filed their individual income tax returns by reporting their entire income from all sources and have deducted the net income earned in New York, pro-rating their personal exemption on the basis of their North Carolina income, as it relates to their entire income for the year, and have paid the tax on the income earned in this State.

They now file claim for refund, under the provisions of Section 325, 1935 Revenue Act. This Section provides that a credit be allowed a non-resident of this State of the amount of tax paid to the State in which he resides on the income earned in North Carolina.

It appears from your letter that the credit for the tax paid in New York is greater than the tax assessed and paid in this State. We, therefore, advise that under the provisions of the Section of the 1935 Act, above referred to, the refund should be allowed.

SUBJECT: APPEAL OF COMMERCIAL CREDIT COMPANY ON SITUS OF TAXATION OF INTANGIBLES

4 December, 1937.

The Machinery Act of 1937, section 201 (4), requires that the intangible personal property of a domestic corporation shall be listed for taxation at its principal office in this State, and further provides that if it has no principal office in this State, its intangible property may be listed in any county in which it transacts business.

The charter of the Commercial Credit Company designates the Durham

Trust Building, Durham, North Carolina, as the location of its principal office in this State.

The facts in this case are not disputed. The corporation has maintained an office at the place designated in its charter continuously since its organization; has had there its agent in charge of such office, and has had its corporate name displayed there as required by law, and has kept its stock and transfer books there.

Its principal business activities, however, have been carried on in the towns of Charlotte, in Mecklenburg County, and Greensboro, in Guilford County, and business offices have been and are maintained at both these places.

The question here is whether the terms "principal office in this State" as used in the corporation law and charter and in the taxing statute are identical in meaning, as they are in verbiage.

The law requiring that the charter of a corporation shall designate its principal office in this State is not apparently concerned with the volume and nature of the business carried on through its other offices; nor could the taxing statute be supposed to contemplate a nice distinction to be determined by evidence and statistics as to which of several offices had become the "principal" office in a factual sense at tax listing time, and which county or municipality was entitled to the listing and the tax.

It is not my province to pass upon the wisdom or the fairness of the law. I merely say that, in my opinion, the proper place for listing and taxing the intangibles of this corporation is Durham, Durham County, North Carolina, at which place the principal office, as I construe the law, is located.

SUBJECT: INCOME TAX; RENTS; VIRGINIA TRUST CO.

6 December, 1937.

You state that the Virginia Trust Company, a foreign corporation, during the year 1935, collected rents on property located in this State, by virtue of a rental assignment appearing in a deed of trust, formerly executed on such property by the owners thereof, default having been made in a loan for which this property was offered as security. Inquiry is made as to whether or not this foreign corporation should pay income tax upon the rents so collected by the Virginia Trust Company, as above described.

Section 315, current Revenue Act, specifically imposes a tax upon this class of income, and we advise, therefore, that an assessment should be made against this foreign corporation upon the rent so collected.

This opinion, of course, is based upon the assumption that this non-resident fiduciary is collecting this rent for the benefit of residents of this State, under the terms of the statute.

RE: TAXABILITY OF CERTAIN MUNICIPAL PROPERTY IN WILSON COUNTY

13 December, 1937.

Referring to the letter of Mr. C. C. Lamm, County Auditor of Wilson County, of date September 10, 1937, relating to the local taxability of certain property of the Town of Wilson, I beg to say:

1. In my opinion the lot owned by the municipality on Goldsboro Street,

not now used for governmental purposes, is subject to tax. *Town of Benson v. Johnston County*, 209 N. C., 751.

2. A municipal swimming pool belonging to the Town of Wilson and operated by that town for the use of the public is not subject to taxation.

3. The Town of Wilson, under the authority of the line of decisions of the Supreme Court heading up in *Town of Benson v. Johnston County*, *supra*, would, in my opinion, be subject to tax on property outside the town used for the purpose of supplying extraterritorial patrons with power or light.

SUBJECT: INTANGIBLES; TAXATION OF DEPOSITS BY RECEIVER OF NATIONAL BANK IN ANOTHER BANK

20 January, 1938.

Receipt is acknowledged of your letter of January 17th with reference to the liability of bank deposits for taxation under Section 701 of the Revenue Act of 1937. From your statement it appears that the Receiver of the Wayne National Bank, of Goldsboro, North Carolina, has on deposit with the Bank of Wayne certain funds collected by the Receiver in process of the liquidation of the Wayne National Bank. The Receiver contends that the deposits made by him in this capacity are exempt from taxation under the intangible personal property schedule.

Section 701 provides in part that the tax levied shall not apply to deposits by one bank in another bank, nor to deposits by federal, state, or local governments, or the agencies of such governmental units.

The deposits in question, in my opinion, would not be exempt by reason of the language "one bank in another bank," but I am of the opinion that they would be exempt by reason of the further provisions of the statute, which exempt deposits by federal, state, or local governments, or the agencies of such governmental units. In the liquidation of the National Bank through the instrumentality of the Receiver appointed by act of the Comptroller of the Currency, it is considered that the Receiver is acting as an agency of the Federal Government. U. S. C. A. 192, Note 41, and numerous cases cited in the annotations. Therefore, in my opinion, the exemption must be allowed.

You inquire further, if the tax is not applicable to the deposits by the Receiver, whether or not the Receiver holding funds by virtue of his office, would be required to pay for those for whom the funds are held the tax imposed by Section 701. It is my opinion that the funds held by the Receiver of the National Bank do not fall within the language or purpose of this section. The Receiver holds the funds for the liquidation of the liabilities of the bank, which include the liabilities to the bank's depositors, as well as other creditors. The Receiver is not a bank, and the funds held by him are not deposits, but are funds collected by the Receiver in the process of the liquidation of the institution.

SUBJECT: INTANGIBLE TAX; RE: HENDERSON COUNTY SOIL CONSERVATION ASSOCIATION, INC.

27 January, 1938.

In reply to your letter of January 22nd on the above subject, I will say that the reference to "Title 10 of the Social Security Act," in Mr. D. W.

Bennett's letter, is not understandable, since Title 10 of the Federal Social Security Act relates to assistance to the blind.

However, soil conservation associations are provided for in U. S. C. A. Title 16, 590 G (d) 2 and in the 1937 Acts of the North Carolina Legislature, Chapter 293 Public Laws of 1937.

When organized in accordance with the State law,—and I assume the Henderson County Association has been properly organized,—a soil conservation association, in my opinion, becomes an agency of the State and is, therefore, exempted from the intangibles tax, under Section 701.

TAXATION—INTANGIBLES—FUNDS IN HAND AS TRUSTEE IN BANKRUPTCY

31 January, 1938.

We have very carefully examined, at a conference this morning, the letter of Mr. Thomas L. Johnson, dated January 25, to you, relative to the liability for the intangibles tax of funds in his hands as Trustee in Bankruptcy of Suncrest Lumber Company.

It is the opinion of this office that since these funds are held by Judge Johnson as Trustee in Bankruptcy for non-residents of the State of North Carolina who do not have a business situs in this State, that there is no tax liability thereon, under the provisions of Section 701, 1937 Revenue Act.

TAXATION—INHERITANCE—INSURANCE POLICY MADE OUT TO BENEFICIARY AND THEN TRANSFERRED TO HER; LIABILITY FOR TAX

14 February, 1938.

In this case in addition to taking out a policy of insurance on his life, making his wife, Mrs. Lucy B. Welch, beneficiary, the insured later made a transfer of the policy to his wife. It is conceded that the premiums on the policy were paid by Mrs. Welch.

The policy was transferred, according to the claim of Mr. P. W. Garland, Attorney for the taxpayer, while Mr. Welch was in good health. It is contended by Mr. Garland that the proceeds of the insurance policy are not taxable under the inheritance tax law upon the death of Mr. Welch.

In my opinion, since Mrs. Welch was the beneficiary under this policy of insurance, the assignment to her of the policy could not materially change the relationship of the parties and would not operate as an ordinary conveyance of property not in contemplation of death. The same situation as to control would have ensued in the event that Mr. Welch had made a contract under which he had no power to change the beneficiary. The transfer of the insurance policy carried with it, of course, no power to enjoy the proceeds which could be realized only upon the death of the insured.

Neither do I think that Article X, Section 7 of the Constitution, has the effect of withdrawing the proceeds of an insurance policy from the power of the State to tax. That constitutional provision simply protects the proceeds of insurance policies from ordinary debts of the insured under the circumstances named therein, and does not apply to taxes.

A comparison between the 1935 Act applicable to the proceeds of insurance policies with the 1937 Act, which I am called upon now to construe, shows the intention of the Legislature to tax the proceeds of insurance policies in the hands of the beneficiary, notwithstanding the payment of

premiums by such beneficiary, providing, however, that such premiums may be deducted from the proceeds before applying the exemption and computing the tax.

SUBJECT: INCOME TAX—FOREIGN CORPORATIONS; DEDUCTIONS OF LOSSES;
IN RE: ROYAL TYPEWRITER COMPANY, INC.

19 February, 1938.

In my opinion, the statute,—current Revenue Act Section 311,—contemplates the allocation to North Carolina, by the formula prescribed, of a reasonable proportion of the entire income of a foreign corporation derived from its activities such as are carried on within the State, and that income can reasonably be considered the income of a unitary business.

It is to be conceded that the corporation may be engaged in a dual or multiple business or enterprise, the parts of which have no logical connection or interdependence as creating a total income, of which a part might be allocated to the State because of its activities therein under the statutory formula.

In my opinion, however, a foreign corporation which for convenience in its operation has caused to be formed subsidiary corporations one hundred per cent owned by the parent corporation, which corporations are engaged in the same activities as that of the parent corporation, so that the whole picture presents the aspect of a unitary business, must be treated with regard to such income as engaged in a unitary business and the entire income is subject to allocation under the statutory formula in arriving at that portion of the income allocable to this State because of its activities here.

Under the facts of this case, it is my opinion that the Royal Typewriter Company is engaged in such a unitary business, and its entire income is derived from the activities of the parent company and of the subsidiary corporations mentioned also, and deductions of losses must be made upon that basis.

I have stated the situation thus in general terms, for the reason that I do not have before me in full the particulars of this case, nor is it clearly stated the nature of the deduction which the Royal Typewriter Company desires to make with regard to its subsidiary corporations. I have only the letter of the Royal Typewriter Company, dated February 11, 1938, for consideration, and this is entirely too general in its terms for specific reply. I believe, however, that I have answered the penciled note attached to Mr. Parks' letter, and you may be able from this to make a proper solution of the question.

SUBJECT: REVENUE LAW, SECTION 109; SUSPENSION OF LAWYER'S LICENSE
FOR NON-PAYMENT OF PROFESSIONAL LICENSE TAX

3 March, 1938.

Suspension of license to practice law under Section 109 of the Revenue Act requires that the person who is delinquent in the payment of tax must have notice, at the instance of the judge presiding at a term of the Superior Court of the county in which the lawyer resides and issued by the Clerk of the Court, to show cause by the next term of court why he should

not be deprived of license to practice his profession because of such delinquency.

This rule shall be served on the person twenty days before the next term of court, and, if cause is not shown at that term, the statute provides that "the said judge may enter a judgment suspending professional license of such person until such tax as may be due shall have been paid."

While the statute uses the term "said judge," I think this must be understood to be the judge presiding at the term of court at which the order to show cause is returnable or is heard, and it does not refer to the judge who caused the rule to be issued. Such a narrow construction would defeat the purpose of the Act.

I am of the opinion, too, that if the matter is not heard at the next term of court, as provided in the statute, it may be heard at any subsequent term of the court, and the person upon whom the order to show cause has been served must take notice of any continuance of the same.

However, if the matter has just been neglected from term to term, the respondent should be served with a copy of the order, or an alias order, under which he is again required to appear and show cause. This would remove any contention on the part of the respondent that there had been a discontinuance of the matter by failing to call it up and formally postponing the hearing.

SUBJECT: INTANGIBLES; INTEREST OF RESIDENT IN FOREIGN TRUST;
TAXABILITY

5 March, 1938.

You have referred to me a letter from Honorable Conway Smith, in which he protests against the intangible tax on the interest of a resident in intangibles held by a foreign trustee, which is made the subject of taxation by your Regulations, D—trustees, administrators, executors and other fiduciaries, subsection (3). In this regulation it is held that such interest of a beneficiary is taxable under the provisions of Section 704 of the Revenue Act, as amended.

I have also received a letter from Judge George Rountree, of Wilmington, N. C., in which he takes the position that such an interest of a resident beneficiary is not subject to taxation. Judge Rountree cites in support of his contention the case of Safe Deposit and Trust Company of Baltimore v. Virginia, 280 U. S. 83.

It is my opinion that the State has ample power to tax the interest of a resident in intangibles held by a foreign trustee; that is to say, to tax the equitable interest of the cestui que trust in the trust property held by the foreign fiduciary. Many cases are cited in support of this position in the note annotating the Safe Deposit and Trust Company Case in 67 A. L. R. 386, the annotation referred to beginning on page 408.

Such a tax, however, is supported only upon the taxation of the equitable interest of the resident in the trust. Any tax which is imposed directly upon the corpus of the trust itself, or the securities held therein, is held invalid in the above mentioned case, if the securities and trustee are both out of the State.

I regret to state that I did not find in Section 704 of the Revenue Act of 1937 language which directly imposes a tax upon the equitable interest

of a resident in a trust fund held by a trustee in this State or elsewhere. In order to levy a tax which could be enforced, it is necessary that the legislation should directly tax this equitable interest and make it the subject of the levy. The language found in Section 704, so far as pertinent to this question, is as follows:

"All sums left on deposit with insurance companies by a resident of this State * * and/or money held in trust funds by Clerks of the Superior Court, executors, administrators, trustees, or other fiduciaries, shall be subject to a tax * * * of twenty-five cents on every one hundred dollars of the amount of such obligations."

The trustees or other fiduciaries are required to report "all sums in their charge that are made taxable under this section and pay the tax on such sums." This language, however, instead of attempting to levy a tax upon the equitable interest of the beneficiary, is a direct levy upon "all sums" in the hands of the trustee.

Therefore, I must conclude that any construction placed upon this section which would attempt to apply this language to the equitable interest of the resident in a foreign held trust fund, is not supported by the Act and cannot be levied thereunder.

SUBJECT: OVERLOADING; PENALTIES; REFUND OF ADDITIONAL TAX

17 March, 1938.

The question arises as to whether or not the Commissioner of Revenue has authority in his discretion to refund the additional \$3.00 per thousand pounds in excess of a license weight of a motor vehicle when the same shall be found in operation on highways carrying such overload.

Section 60, Chapter 407, Public Laws of 1937, deals with this subject and provides in effect that the calculation of the fee for vehicles shall be determined at a rate per hundred pounds, and that such calculation shall be made in units of thousand pounds or major fraction thereof, excessive weights of 500 pounds, or less, being disregarded and weights of more than 500 pounds and not more than 1,000 pounds being counted as 1,000.

It is specifically stated in this Section that the intent thereof is that every owner of a motor vehicle shall procure a license in advance to cover any overload which may be carried and that any owner who fails to do so and whose vehicle shall be found in operation on the highways carrying an overload in excess of one ton over the weight for which such vehicle is licensed "shall pay in addition to the normal tax levied in this Act an additional tax of \$3.00 per each thousand pounds in excess of the license weight of such vehicle."

From the very wording of this Section of the Act, it is clearly seen that the Commissioner has no discretion as to whether or not this additional tax should be levied, or that he has any discretion to refund the same after it has been so assessed, since this is an additional tax to be levied where the operator of a motor vehicle is found to be carrying a load in excess of that for which the vehicle was licensed.

MOTOR VEHICLE LAWS—STREETS AND HIGHWAYS—PEDESTRIANS—RIGHTS

23 March, 1938.

The following is the North Carolina Law relative to the rights of pedestrians on the streets and highways in this State:

Certain statutes in North Carolina regulate the use of highways and streets by pedestrians.

Consolidated Statutes 2621 (99a) provides:

"Pedestrians shall be subject to traffic control signals at intersections as heretofore declared in this article, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in this article."

Consolidated Statutes 2621 (99b) provides:

"(a) Where traffic control signals are not in place or in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping, if need be, to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this Article.

"(b) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle."

Consolidated Statutes 2621 (99c) provides:

"(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

"(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

"(c) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk.

"(d) It shall be unlawful for pedestrians to walk along the traveled portion of any highway, except on the extreme left hand side thereof, and such pedestrians shall yield the right-of-way to approaching traffic.

"(e) Notwithstanding the provisions of this Section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

Consolidated Statutes 2621 (99d) provides:

"Pedestrians shall move, whenever practicable, upon the right half of crosswalks."

Consolidated Statutes 2621 (99e) provides:

"No person shall stand in the travel portion of the highway for the purpose of soliciting a ride from the driver of any private vehicle."

Consolidated Statutes 2621 (99f) provides:

"Any person, firm, or corporation violating any of the provisions of this Act shall be deemed to be guilty of a misdemeanor, and punished by fine or imprisonment in the discretion of the court as for other misdemeanors. Each violation shall be deemed a separate offense."

SUBJECT: APPLICATION OF USE TAX-BUILDING MATERIALS; OTIS ELEVATOR COMPANY—CHICAGO BRIDGE & IRON COMPANY

30 March, 1938.

Consideration has been given to the question presented in your letter of March 4th with respect to the application of the use tax imposed by section 427 of the Revenue Act of 1937 in connection with the Otis Elevator Company of Atlanta, Georgia, and the Chicago Bridge & Iron Company of Chicago, Illinois. I have considered very fully the brief submitted by the attorneys for the taxpayers and their contentions with respect to the imposition of the use tax on their transactions in this State.

In each case it is contended that the fulfilling of contracts for the erection of elevators as to the Otis Elevator Company, and for the erection of storage tanks as to the Chicago Bridge & Iron Company, were transactions in interstate commerce, as to which the State is prohibited from levying a tax imposed by this section.

Without going into a detailed discussion of the contracts as disclosed by the files, it is my opinion that in neither case is the imposition of the use tax imposed by this section prohibited by the Commerce Clause of the Federal Constitution. This question is discussed at some length by counsel for the taxpayers, with citation of authorities which it is contended support their views. A full discussion of the subject may be found in annotations appearing in 101 A. L. R. 356 and 11 A. L. R. 614. For the present purpose, I think it may be sufficient to refer you to these annotations, in which many authorities are collected.

Under section 427 of the Revenue Act of 1937, an excise tax is levied of 3% of the purchase price of all tangible personal property purchased or used subsequent to June 30, 1937, which shall enter into or become a part of any building or other kind of structure in this State, including all materials, supplies, fixtures, and equipment of every kind and description, which shall be annexed thereto or in any manner become a part thereof, with certain exceptions not here involved. Under the provisions of this law, you are fully authorized to collect the 3% excise tax from the owner of the building or structure which is erected in this State by either the Otis Elevator Company or the Chicago Bridge & Iron Company.

This tax should be imposed upon the total contract price at which the property is purchased. If, however, in erecting these structures a part of the cost is labor involved in assembling the various units employed in the construction, if the taxpayer furnishes a satisfactory separation of the cost of this labor from the tangible personal property so purchased, you would be authorized to eliminate such labor costs from the construction. If the separation is not made satisfactorily, you should impose a tax upon the total contract price.

SUBJECT: INHERITANCE TAX; ESTATE OF JOSHUA R. DAVIS

4 April, 1938.

I have your letter of March 24th, in which you advise that Joshua R. Davis made a deed to his children over three years prior to his death for certain real estate, reserving a life estate to himself. You advise that a

question has arisen as to the taxability of the value of this property upon the death of Mr. Davis intestate.

Under Section 1, Revenue Act of 1937, and of similar provisions of previous Revenue Laws, a tax is imposed upon the transfer of any property, real or personal, or any interest therein or income therefrom, including transfers by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor or donor, *or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (a) the possession or enjoyment of or income from the property, or (b) the right to designate the persons who shall possess or enjoy the property or the income therefrom.*

Under this provision above underscored, the transfer by deed made by Mr. Davis by way of a gift to his children, reserving his life estate, postponed the possession and enjoyment of the property until his life estate terminated. Therefore, the value of the property which came into possession and enjoyment of his children at his death is proper subject for assessment of Inheritance Tax imposed by the Revenue Act. See *Bank v. Doughton*, 188 N. C. 762. See also 61 C. J., paragraph 2474, citing many cases.

SUBJECT: INCOME TAX—ALLOCATION; FOREIGN CORPORATION—
PARKS-CRAMER COMPANY

4 April, 1938.

I have your letter of April 1st, in which you refer to the allocation of the income of a foreign corporation under Section 311 of the Revenue Act of 1935. It is noted that the taxpayer contends that the allocation of the proportion of its inventories to North Carolina shall be the tax value of these inventories rather than the book value, depending in support of this contention upon subsection 2, paragraph (a) of Section 311, in which the ratio is referred to the "fair cash value of its real estate and tangible personal property in this State."

By reference to Section 311, (2) (d), you will find that "fair cash value" as used in this subsection shall be taken to mean cost less reserve for depreciation, unless in the opinion of the Commissioner peculiar circumstances in any case justify a different basis. The same definition is provided in subsection 1, (f).

This, I think, fully answers your question, and unless there are peculiar circumstances which justify you in disregarding the book value of the assets in North Carolina, the book value should be followed. A taxpayer has no right to insist upon the book value of these assets, unless he comes, in your opinion, within the above exception.

SUBJECT: RULES AND REGULATIONS; CHAPTER 425, PUBLIC LAWS OF 1937

5 April, 1938.

You inquire in your letter of April 2 as to the authority of the State Gasoline Inspection Board to issue a regulation requiring gasoline dealers who display price signs at or near their filling stations to state upon such signs the grade of gasoline to be sold at the designated price.

One object of this Act of the General Assembly was, as set out in Section 4, to protect the public from fraud, substitutions, and other reprehensible practices which might deceive, tend to deceive, or have the effect of deceiving the purchaser of said products as to the nature, quality, or quantity of the products so sold, exposed, or offered for sale. (Section 28.)

Section 9 of the Act provides, among other things, that it shall be the duty of the Board therein set up "to adopt standards for the various grades of gasoline based upon scientific tests and ratings, and for each of the articles for which inspection is provided, to prescribe the form of the label for the various grades of gasoline, and to pass all rules and regulations necessary for the enforcement of the provisions of the laws relative thereto."

We think the authority so granted in this Section, as well as other applicable Sections in the Act relative to the powers and duties of the State Board of Gasoline and Oil Inspection, is ample authority of your Board for the issuance of a regulation in this regard.

SUBJECT: INCOME TAX DEDUCTIONS

April 9, 1938.

This office is of the opinion that under the provisions of Section 322, Sub Section 6, of the 1937 Revenue Act, losses sustained during the income year on property not used or connected in trade or business would not be an allowable deduction in computing net income.

SUBJECT: INTANGIBLES TAX

12 April, 1938.

Inquiry is made as to whether or not credit balances of any person, firm, or corporation in the hands of brokers would be subject to the intangibles tax levied under Section 701 or 703 of the 1937 Revenue Act.

It could not be taxed under Section 701 because of the fact that a tax here is levied upon "all money or deposits with any commercial, industrial, savings bank or trust company, or other corporation doing banking business."

We are of the opinion that such credit balances should be taxed as "accounts receivable" under the provisions of Section 703 of the Act.

SUBJECT: MOTOR VEHICLE LAWS; FOR HIRE OPERATORS; LIABILITY FOR CONTRACT HAULER'S LICENSE BY COMMISSION MERCHANTS AND CONSIGNMENT DEALERS

20 April, 1938.

The question is presented to this Office as to whether or not a taxpayer is liable for contract hauler's license under the following facts:

The taxpayer has entered into a contract with a firm in Franklin County under which he sells fertilizer and allied products as a sub-agent or sub-dealer of said firm. This sub-dealer, by arrangement with the dealer in Franklin County, receives the fertilizer which is to be sold by him on a consignment basis direct from the fertilizer manufacturing company in

Greensboro, and delivers it directly to the farmers and other customers of his at various places within the State of North Carolina.

In some instances, when orders have been taken for future delivery, this sub-dealer, at his own expense, stores such fertilizer so ordered at a warehouse for future delivery. He receives his compensation for the sale of this fertilizer on a consignment and commission basis, under the contract referred to above, and is at all times responsible to his principal for the amount of fertilizer sold by him, less the commission he receives under such contract.

Under date of May 15, 1934, this Office rendered an official opinion to your Department holding that this class of operation would be exempt from the payment of a contract hauler's license, under the provisions of Consolidated Statutes 2621 (29-b) (Michie's Code) which excludes a certain class of operators who deal in property on a consignment and commission basis. This exclusion clause was eliminated in the 1937 Motor Vehicle Act; however, regardless of the elimination of this exclusion in the new law, we are of the opinion that the sub-dealer carrying on the operations above described has such a proprietary interest in the fertilizer which he is hauling in his own trucks that he would not be subject to the payment of a contract hauler's license, prescribed in the 1937 Motor Vehicle Laws.

SUBJECT: TAXATION; INTANGIBLE PROPERTY; DEDUCTIONS FOR TAXES DUE

27 April, 1938.

Section 703 of the Revenue Act of 1937 imposes a tax upon accounts receivable, and allows a deduction for "current bills payable." Section 705, which undertakes to impose a tax on bonds and other evidences of debt, allows a deduction of "evidences of debt owing by the taxpayer."

In your letter of April 26th you raise the question of whether taxes that are due and are unpaid constitute a legitimate subject for deduction under either of these two sections. Following the well recognized principle that a tax is not a debt, it seems clear that they should not be deducted under either of these two sections.

You will note that Section 703 instead of using the term "debt," allows a deduction for "current bills payable." Upon the same principle, under which the tax is not considered as a debt, we are of the opinion that it cannot be classed as a "current bill payable."

SUBJECT: INTANGIBLES PERSONAL PROPERTY TAX; ANNUITY CONTRACTS
PLACED AS COLLATERAL FOR LOAN AT A BANK

9 May, 1938.

You state that banks accept annuity contracts as collateral for loans made to individuals in whose name the contracts were originally issued, and you inquire as to who should list and pay the intangible tax on these annuity contracts.

Even though these annuity contracts might be actually transferred to the bank, it is transferred only as collateral security for the payment of an obligation of the individual owner to the bank, and is not the actual

property of the bank, unless, and until, upon default of the payment of the loan, the bank applies the proceeds of such contract to the payment of the note.

We think that such annuity contracts should be listed by the individual to whom it was originally issued.

SUBJECT: TAXATION; INTANGIBLES; EXEMPTIONS; BENEVOLENT
ORGANIZATIONS

12 May, 1938.

In your letter of May 6 you enclose a letter from Mr. L. L. Wooten in which he claims an exemption from the intangible personal property tax as levied under section 701 of the 1937 Revenue Act. Mr. Wooten's letter discloses that the funds sought to be exempted are held in the Wilmington banks by the System Board of Adjustment for the Brotherhood of Railway and Steamship Clerks. The moneys belonging to the organization are used "for the making and maintaining of labor contracts, adjustment of wages and grievances, as well as the taking care of employees to some extent who are out of work and who are sick."

Section 714 of the Intangible Tax Law reads in part as follows:

"None of the taxes levied in this article shall apply to religious, educational, charitable or benevolent organizations not conducted for profit . . ."

In view of the well established principle by which exemptions from taxation are to be construed strictly, we are of the opinion that this organization does not fall within the terms of the above statute. It is to be noticed that a portion of the funds in question is devoted to the obtaining of advantageous contracts for its members. Without criticising in any way such a worthwhile purpose, it certainly cannot be classed as benevolent or charitable. It will be noticed further that a portion of the funds is devoted to the care of indigent members of the organization. As we understand the term, however, a benevolent or charitable society is one which is organized for the dominant purpose of doing good to others rather than for the benefit of its own members. The fact that the association in this case confines its charitable activities to its own membership takes it out of the class of charitable or benevolent organizations as we understand these terms.

SUBJECT: INCOME TAX; RESIDENTS—INCOME FROM FOREIGN TRUST AND
PERSONAL SERVICES

12 May, 1938.

I have your letter of May 4 attaching letter from Justice J. Wallace Winborne under date of April 22, in which he inquires as to the taxability of income received by a resident beneficiary of a trust estate created by a resident of Roanoke, Virginia, of which the First National Exchange Bank of Roanoke is the Trustee.

Such income is taxable under section 310 of the Revenue Act of 1937, unless it is exempted by reason of section 322(10). This subsection exempts the net income of a resident having an established business in another State or investment in property in another State, provided such income is

taxed by the State in which such business or investment is located. The section, however, provides that this deduction shall not relate to income received from personal services or income from mortgages, stocks, bonds, securities and deposits. The letter from Justice Winborne does not disclose the nature of the assets of the trust estate. If the trust estate consists of the intangibles mentioned above, the exemption would not apply. If, however, the trust estate consists of real property or tangible personal property held by the Virginia Trustee, the income received by the resident of this State from such source would not be taxable. The Virginia law, Virginia Code of 1936, Section 38, appears to impose an income tax similar to the provisions contained in the North Carolina law.

It is quite clear that the State may levy a tax on the income of a resident of this State derived from trust estates held by foreign trustees or from property located outside of the State. *Maguire v. Trefry*, 253 U. S. 12 and many cases cited in an annotation, 87 A. L. R. 380.

RE: U-DRIVE-IT PASSENGER VEHICLES

23 May, 1938.

We have examined the letter addressed to you from Messrs. Fox, Rothschild, O'Brien & Frankel, Attorneys representing Robinson Auto Rental Company.

We are of the opinion that the Robinson Auto Rental Company is subject to the tax levied under the "U-Drive-It" Section of the Motor Vehicle Laws because, in fact, the Auto Rental Company leases to Colgate Palmolive Peat Company passenger motor vehicles which are used by the agents and servants of the Colgate Company. We think this is true regardless of the fact that the Colgate Company has the option to buy such leased automobiles at the end of any given year.

SUBJECT: INCOME TAX; BANKRUPT CORPORATIONS; TRUSTEES IN
BANKRUPTCY

26 May, 1938.

In your letter of May 23rd you enclose a letter from Mr. H. W. Jacobson, counsel for United Cigar-Whelan Stores Corporation, wherein he concedes that the Federal law gives the states power to tax trustees in bankruptcy, not only upon the salary which they receive as such trustee, but upon the income of the bankrupt estate which is being administered. He questions, however, the actual levy of such a tax by our State Revenue Act.

Section 124A of Title 28, U. S. C. A., specifically provides that such fiduciaries shall be subject to all state and local taxes applicable to such business, the same as if such business were conducted by an individual or a corporation.

Our State Revenue Act specifically levies an income tax on the operations of trustees in bankruptcy. Attention is called to the following language appearing in the article which levies tax in this State:

Section 301. The purpose of the article is to impose a tax for the use of the State Government upon the net income of—

(a) Every resident of the State.

(b) Every domestic corporation.

(c) Every foreign corporation and every non-resident individual having a business or agency in this State or income from property owned, and from every business, trade, profession, or occupation carried on in this State.

Section 302. Definitions.

1. The word "taxpayer" includes any individual, corporation, or fiduciary subject to the tax imposed by this article.

4. The word "fiduciary" means guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporation, acting in any fiduciary capacity for any person, estate, or trust.

5. The word "person" includes individuals, fiduciaries, partnerships.

Section 310. This Section imposes the tax and is in part as follows:

"A tax is hereby imposed upon every resident of the State, which tax shall be levied, collected and paid annually, with respect to the net income of the taxpayer as herein defined, and upon income earned within the State of every non-resident having a business or agency in this State or income from property owned and from every business, trade, profession or occupation carried on in this State . . ."

The above are excerpts from sections in Article IV of Chapter 127 of the Public Laws of 1937, said Article being the income tax division of the current Revenue Act and by the very wording thereof, there is no doubt as to the authority of the State to levy an income tax upon the operations of trustees in bankruptcy.

SUBJECT: THE GASOLINE AND OIL INSPECTION ACT OF 1937—CONFISCATION OF GASOLINE THEREUNDER; SALE OF A HIGHER GRADE OF GASOLINE UNDER A LOWER GRADE LABEL

8 June, 1938.

This letter is written in reply to your letter of June 6, 1938, requesting our opinion upon three questions therein stated and arising under the Gasoline and Oil Inspection Act of 1937, Chapter 425, Public Laws of 1937.

Section 9 of the Act authorizes the Gasoline and Oil Inspection Board to adopt standards for the various grades of gasoline, and to prescribe the labels therefor, and is in part as follows:

"Sec. 9 . . . It shall be the duty of the Gasoline and Oil Inspection Board, after public notice and provision for the hearing of all interested parties, to adopt standards for the various grades of gasoline based upon scientific tests and ratings and for each of the articles for which inspection is provided, to prescribe the form of the label for the various grades of gasoline, and to pass all rules and regulations necessary for enforcing the provisions of the laws relating to the transportation and inspection of petroleum products. After the adoption and publication of said standards it shall be unlawful to sell or offer for sale or exchange or use in this State any products which do not comply with the standards so adopted . . ."

Like authority is granted by Section 10 of the Act.

The pertinent provisions of Section 11 of the Act are as follows: It provides that each dispensing pump used in retailing gasoline shall have firmly attached or painted thereon "a label stating that the gas contained therein is North Carolina ——— Grade." It shall be the duty of the Gasoline and Oil Inspection Board to prescribe the form of said label. Any person who shall offer or expose for sale gasoline from any pump "which has not been labeled, as required by this Section, and/or offer and expose for sale any gasoline which does not meet the required standard for the grade indicated on the label" shall be guilty of a misdemeanor, "and the gasoline offered or exposed for sale shall be confiscated."

Section 16 of the Act is in part as follows: It provides that gasoline and oil inspectors "shall have the right of access to the premises and records of any place where the petroleum products are stored for the purpose of examination, inspection, and/or drawing of samples, and that said inspectors are hereby vested with the authority and powers of peace and police officers in the enforcement of motor fuel tax and inspection laws throughout the State, including the authority to arrest, with or without warrants, and take offenders before the several courts of the State for prosecution or other proceedings, . . ."

Section 28 of the Act incorporates as part thereof "An Act to Prevent Deception" in the sale of gasoline, Public Laws of 1933, Chapter 108, and Section One of the latter Act is as follows:

"Section 1. That it shall be unlawful for any person, firm, co-partnership, partnership or corporation to store, sell, offer or expose for sale any liquid fuels, lubricating oils, greases or other similar products in any manner whatsoever which may deceive, tend to deceive or have the effect of deceiving the purchaser of said products, as to the nature, quality or quantity of the products so sold, exposed or offered for sale."

QUESTIONS ONE AND TWO

Section 11 of the Act provides that dispensing pumps shall have a device stating that the gasoline contained therein is one of the grades adopted and promulgated by the Gasoline and Oil Inspection Board, under the authority of Sections 9 and 10; that any person who offers or exposes for sale gasoline not so labeled, or which does not meet the required standard for the grade labeled on the pump, shall be guilty of a misdemeanor "and the gasoline offered or exposed for sale shall be confiscated."

Section 16 of the Act gives the inspectors the right of access to the pumps and the power of arrest. The further provisions of this Section relate only to transportation, which matter is not embraced within your questions.

In the confiscation of non-labeled or mis-labeled gasoline, seizing and sealing the dispensing pump is the first step following or accompanying the arrest of the accused. It is a necessary step for the reason that in the absence of sealing, the accused could very easily sell or otherwise dispose of the gasoline in violation of the Act between the time of arrest and the judgment of the court. The Act does no more than permit the inspectors to seize and seal the pumps, for the confiscation contemplated in the Act is confiscation by judicial process or decree. The Act does not provide for or

permit administrative confiscation by the inspectors. Under such confiscation, the disposition to be made of the gasoline is solely a matter for the court in which the indictment is brought, and your Board has no power or duty with respect thereto.

QUESTION THREE

Section 9 of the Act makes it unlawful to sell gas "which does not COMPLY with" the prescribed standards, and part of Section 11 makes it unlawful to sell gasoline "which does not MEET" the required standard. Selling regular grade gasoline from a motor grade pump is MORE than a compliance with and more than MEETS the prescribed standards. Such sale, therefore, is, in our opinion, not unlawful for non-compliance with or failure to meet the grade standards.

However, Section 11 explicitly provides "That at all times there shall be firmly attached or painted on each dispensing pump or other dispensing device used in the retailing of gasoline a label stating that the gasoline contained therein IS North Carolina ——— Grade," and that any person who "shall offer or expose for sale gasoline from any dispensing pump or other dispensing device WHICH HAS NOT BEEN LABELED, AS REQUIRED BY THIS SECTION, and/or offer and expose for sale any gasoline which does not meet the required standard for the grade indicated on the label attached to the dispensing pump or other dispensing device, shall be guilty of a misdemeanor.

Under Section 11, we think it unlawful for any retailer to sell gasoline from a pump not correctly labeled. The statute simply requires coincidence between the label and the grade, no more, no less. Therefore, it is as much a violation of the Act to sell regular grade under a motors grade label as it would be to sell motor grade as regular grade. The Section requires no deception. It makes the sale of mis-labeled or non-labeled gasoline unlawful per se.

We now come to the matter of deception as embraced within question 3.

Section 4 of the Act sets forth as one of its aims "the end that the public be protected in the quality of petroleum products that it buys" and "that frauds, substitutions, adulterations, and other reprehensible practices may be prevented."

Section 1 of the 1933 Deception Act makes it unlawful to sell gasoline in any manner "which may deceive, tend to deceive, or have the effect of deceiving the purchaser of said products, as to the nature, quality, quantity, of the products so sold, exposed or offered for sale."

Section 7, 1933 Act, makes violation of its provisions a misdemeanor.

You suggested in conference that under a system of standards which includes Premium, Regular and Motor Grades of gasoline, it is a deceptive and reprehensible practice to sell a higher grade gasoline under the label of a lower grade gasoline, since no purchaser would buy the Regular Grade at 21 cents if he could buy it from a Motor Grade pump at 18 cents, nor would he do so even if the two grades could be bought for the same price. This suggestion is, in our opinion, well-founded. Such practices tend to demoralize the promulgated system of grades and standards. It is, likewise, a fraud upon every purchaser that buys the Regular at 21 cents

when he could have bought it under the Motor Grade Label at 18 cents.

It is our opinion that if, in any particular case, the retailer proved that in fact there was no deception, as, for example, that he told the purchaser before sale that he was buying Regular Grade gasoline from a Motor Grade pump, the retailer would not be guilty of a fraud or deception. It seems quite plain, therefore, that Section 11 of the Act is a safer and more effective reliance than the Sections dealing with the deception. Under these latter Sections, the argument that retailers ought not to be prevented from selling to the public a higher grade gasoline for the price, and under the label, of a lower grade gasoline, would have greater force. Under the simple prohibition of Section 11 such argument would be immaterial.

SUBJECT: INCOME TAX; SECTION 324, 1 (D); \$200.00 EXEMPTION
FOR DEPENDENTS

10 June, 1938.

You ask whether, under Section 324, 1 (d), it is required that the dependent be under 18 years of age to entitle a widow or widower to the \$200.00 exemption provided for therein.

It is the opinion of this office that the \$200.00 exemption can be claimed only for a child under 18 years of age, or who, though over 18 years of age, is incapable of self-support because mentally or physically defective.

SUBJECT: TAXATION; INTANGIBLE PROPERTY; DEDUCTIONS FOR TAXES DUE

13 June, 1938.

In a letter dated April 27, 1938, this office ruled that the deductions allowed under sections 703 and 705 of the current Revenue Act for "Current bills payable" and for evidences of debt owing by the taxpayer did not include taxes due by the taxpayer.

Some question has arisen as to whether or not taxes due under the Revenue Act do not constitute a debt in view of section 809, which provides as follows:

"Every tax imposed by this Act and all increases, interest and penalties thereon shall become from the time it is due and payable a debt from the person, firm, or corporation liable to pay the same to the State of North Carolina."

As you know, it has been the uniform holding that taxes do not constitute debts as that term includes only those obligations resting upon contract. In our opinion the above section does not have the effect of changing the general rule in regard to what constitutes a debt. We have so ruled upon several occasions. You will notice that section 809 is placed in the portion of the Revenue Act relating to remedies and methods of collection. Its obvious purpose is to facilitate the collection of taxes by enabling them to be collected as a debt. We do not believe that the section in any sense has the effect of altering the nature of a tax.

RE: GENERAL TIRE & RUBBER Co.; INTANGIBLE PERSONAL PROPERTY TAX

24 June, 1938.

In reply to your letter of June 22, we are of the opinion that your first

question must be answered in the negative. Upon the facts stated in the letter of the taxpayer, it certainly is not shown that the intangibles referred to had no taxable situs in this State.

In referring to the progress of the law as to the tax situs of intangibles, Chief Justice Hughes said in *Wheeling Steel Corporation vs. Fox*, 298 U. S., 193, 210, 80 L. ed., 1143, 1148, 56 Sup. Ct. 773, (for Case below see 104 A. L. R. 806) :

"There has been an analagous development in connection with intangible property by reason of the creation of the choses in action in the conduct by an owner of his business in a state different from that of his domicile. (Citations.) . . . These cases 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they become integral parts of some local business.' . . . Here, the tax is a property tax on accounts receivable as separate items of property, and these are not to be regarded as part of the manufacturing plants where the goods sold are produced. . . . The accounts are not necessarily localized in whole or in part where the goods are made, but are *attributable as choses in action to the place where they arise in the course of business of making contracts of sale.*"

In answer to your second question, notwithstanding that Section 703 of the Revenue Act of 1937, does not expressly so provide, we think that, as applied to foreign corporations, the interpretation of the Act that you should adopt is that it allows the taxpayer a deduction of its accounts and bills payable, to be ascertained as follows:

Find the taxpayer's total accounts receivable and the proportion of the same in this State; allow as a deduction the same percentage of its total accounts and bills payable as its accounts receivable in this State bear to its total accounts receivable, omitting, however, indebtedness on account of capital outlay. A similar allowance is upheld in *Mecklenburg County vs. Sterchi Brothers Stores*, 210 N. C., 79, 87.

It is our opinion that the intangibles in this State arising out of all three of the types of businesses mentioned in the fourth paragraph of the taxpayer's letter are taxable.

RE: EXEMPTION OF LAUNDRY STAMP TAX ON WORK DONE FOR STUDENTS;
DAVIDSON COLLEGE LAUNDRY AND DRY CLEANING ESTABLISHMENT

29 June, 1938.

In your letter of June 23, you state that the Davidson College Laundry and Dry Cleaning Establishment placed tax stamps upon all packages that left the plant, except packages of laundry done for students of the College, upon which no stamps are placed. You inquire whether the latter packages were taxable under Section 150, Revenue Act of 1937.

We are of the opinion that this question must be answered in the affirmative. There are no exemptions from the tax provided. If colleges are engaged in the laundry business, they are required to fix the proper stamps to all deliveries, including those to students and faculty, as well as others.

RE: CLAIM OF DREXEL FURNITURE CO. FOR REFUND OF GASOLINE TAX;
FILING AFTER TIME ALLOWED BY LAW

29 June, 1938.

In accordance with your request, we have carefully considered the letter of Hon. J. Ed Butler, dated June 20, 1938, and the affidavit attached thereto.

Michie's Code, Section 2813 (i-15), provides that "all claims for refunds for tax or taxes for motor fuels under the provisions of this article shall be filed with the Commissioner of Revenue on forms to be prescribed by him, between the first and the fifteenth day of January, April, July, and/or October of each year, *and at such periods only*, . . ." Subsection (e) of this Section is as follows:

"No refund of tax or taxes shall be paid on motor fuels, except under a refund permit and to the person, association, firm, or corporation named in said refund permit in the manner herein provided for."

For many years this office has consistently held to the opinion that a claim for refund filed after the time allowed by the statute comes too late, and cannot be allowed. We have also consistently held to the opinion that you have no discretion in the matter, and that the provisions of the statute cannot be waived by you. On February 11, 1935, Attorney General Seawell, in passing upon a like claim by Mrs. Leo H. Harvey, expressed this opinion to you:

"The law specifically provides a method by which gasoline tax refunds may be made, and this law must be followed strictly as the Commissioner has no discretion in the matter. We do not think that a letter asking for an extension of time in which to file a refund would be a sufficient compliance with the law regarding such refund.

"The application for refund in the instant case was made on the 31st day of January, whereas it should have been made on or before the 15th of January. We think the ruling of this Department of date August 8, 1932, is correct with regard to this matter, and we do not see fit at this time to change the same."

It is necessary to set such time limits, and there will always be cases falling just on the other side of the line. This would be true no matter what period was granted. In all such cases it long has been held, and is now, that the filing of the claim within the time allowed by law is a condition precedent, which you have no power to waive. We regret very much that we cannot agree with Mr. Butler's suggestion to the contrary.

RE: INCOME TAX—PROPERTY INHERITED—DATE AND BASIS FOR
DETERMINING GAIN OR LOSS ON SALE

29 June, 1938.

It appears that some of the stocks in this matter were acquired by Mrs. Thomasene H. Woolsey prior to January 1, 1921, and that they lawfully became the property of Mrs. Ella Woolsey Reed upon the death of Mrs. Thomasene H. Woolsey. The stocks have been sold by Mrs. Reed, and the question is what date should be taken as the basis for determining her gain or loss on the sales.

The N. C. Code of 1935, Section 7880, (136), provides that in computing

"net income," "the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income, but which follows as nearly as practicable the Federal practice."

Code 7880, (152), provides that if any change is made in the amount of net income for any year by the Federal authorities, a like change shall be made by the State authorities, and the tax increased or decreased accordingly.

In cases where property is acquired by will or by inheritance after 1913, the Federal Law provides that the basis for determining gain or loss on sale shall be the value assessed for inheritance and estate tax purposes, which is the fair and reasonable market value as of the death of the former owner.

Code 7880, (137), provides that "for the purpose of ascertaining the gain or loss from the sale or other disposition of property . . . the basis shall be, in the case of property acquired before January 1, 1921, the fair market price of the value of such property as of that date."

Code 7880, (135), defines "gross income" and excludes therefrom property acquired by gift, will, or inheritance. Some of the Federal authorities hold that were it not for a similar provision in the Federal Law, the legatee of stock inherited would be subject to an income tax upon the entire sales price of the stock. The Federal Law, however, taxes the value prior to death by laying an estate tax thereon, and the value after death realized on sale is included in gross income for income tax purposes.

It is our opinion that 7880, (137), is inapplicable. It applies only where the taxpayer "acquired" the property sold prior to January 1, 1921. Mrs. Reed did not "acquire" the stocks referred to prior to January 1, 1921. She "acquired" these stocks as of the date of the death of Mrs. Woolsey, and their values as of that date, as assessed for inheritance tax purposes, furnish the basis for computing the gain or loss on sales.

This method not only follows the Federal practice, as you are specifically required to do by Section 7880, (136), wherever it is practicable to do so, but, likewise, follows the practice generally prevailing in other States.

OPINIONS TO COMMISSIONER OF AGRICULTURE

SUBJECT: VACCINATION OF DOGS FOR RABIES; INDICTMENT

13 July, 1936.

Upon reading the file in this case, I have reached the conclusion that the indictment of a person who had not been notified by the veterinarian, as required in Section 8 of Chapter 122, Public Laws of 1935, and where the publication of notice of date of vaccination may be performed and date of same had not been given, is premature if brought within 90 days after the time vaccination is made in the county.

In order to make a person liable for violation of the law, a definite time and place for the presentation of the dog for vaccination must be advertised and the party must have failed to present the dog for vaccination at such time and place, or under Section 8, to render the person liable, the Sheriff must have notified the owner of a dog which is not wearing the metal tag to have same vaccinated within three days.

SUBJECT: MARKETING AGREEMENTS; AUTHORITY OF COMMISSIONER TO
PROMULGATE RULES AND REGULATIONS PERTAINING TO
GRADING AND INSPECTION

22 July, 1936.

Our interpretation of Public Laws of 1919, an Act to provide for the establishment of standard packages, grades, state brands, and for other purposes, is that all men engaged in the inspection and certification as to the grades of farm products must conform to the rules and regulations promulgated by the Department of Agriculture.

Your particular attention is called to Section 6 of the above Act which provides in effect that the Board is authorized to employ, license, or designate persons to inspect and classify farm products, and to certify as to the grade or other classification thereof in accordance with standards prescribed in the Act.

SUBJECT: REGULATION OF SALE OF BLEACHED FLOUR; CHAPTER 248, PUBLIC
LAWS OF 1915 AS AMENDED BY CHAPTER 249, PUBLIC LAWS OF 1917

4 August, 1936.

You state that Mr. Crayon C. Efird, as Receiver of the Lowder Milling Company of Stanly County, has operated and sold flour throughout the year 1935 and has not paid the inspection fee provided for in Section 6 of the above Act. You inquire if he is liable for the payment of this tax out of funds in his hands belonging to the Receivership.

It is well settled in this State and in other jurisdictions that a Receiver is liable for taxes for the privilege of carrying on and exercising the powers conferred by the original certificate of incorporation. (Stagg vs. Nissen, 208 N. C. 285; Michigan Trust Company, 286 U. S. 334, 76 L. Ed. 1136, United States Reports.)

The levying and collection of this inspection fee is purely and simply a

police measure passed for the protection of the general public. The reasoning applied in the cases cited above could be more strongly applied in the instant case. A Receiver cannot avoid the payment of the fee described simply because he is operating this corporation under an order of court. The fees should be paid by him immediately. If he is in some doubt as to whether or not he has the authority to pay, he should apply to the court which appointed him Receiver for instructions.

RETAIL MANUFACTURERS OF ICE CREAM

19 January, 1937.

A hotel, as I understand it, is engaged in the manufacture of ice cream in part to supply its regular customers at meals, but other customers would be served with ice cream alone if desired. The question has arisen as to whether or not this hotel, or other hotels doing a like service and so manufacturing their own ice cream, would be liable to the inspection fee charged retail manufacturers of ice cream.

It seems to me to make no difference whether the ice cream is manufactured for general sale and distribution or whether it is manufactured for sale only in the coffee shop or other eating places of the hotel. The fee charged for inspection is based upon the necessity for securing sanitary methods in the manufacturing of the ice cream. The purpose of the law would hardly be served by making a distinction between this kind of service and any other, as the effect of unsanitary methods would be the same and, literally speaking, the hotel is a retail manufacturer of ice cream no matter whether it sells it to its ordinary customers or to the public generally.

SUBJECT: LICENSE TAX; SEED DEALER

27 January, 1937.

I have your letter of January 25, in which you inquire whether or not a seed dealer who has more than one place of business is required to pay the tax imposed by C. S. 4630 on each separate place of business conducted by him. It is my opinion that the statute does not require the payment of but one fee by the dealer regardless of the number of places of business he may operate.

In the Revenue Law, it is provided that the license taxes imposed are for each separate place of business conducted by the licensee. No such provision is found in Section 4630, which imposes the tax here referred to. I assume the statute referred to is the one to which you have reference but which you do not directly mention.

SUBJECT: STATE FAIR; LIABILITY OF MEMBERS OF BOARD OF AGRICULTURE FOR OPERATION

30 January, 1937.

I have before me an excerpt from the minutes of the meeting of the Board of Agriculture on January 29, 1937, requesting that I give a written opinion as to the personal liability of members of the Board of Agriculture in

case the State Board of Agriculture should operate the State Fair and a loss should ensue from its operation.

Under authority of Chapter 360 Public Laws 1931, Section 3, the Board of Agriculture succeeded the Board of Directors theretofore operating the State Fair under Chapter 209, Section 2, Public Laws 1927. Examining both these statutes, and particularly the statute under which the management and operation of the State Fair was taken over by the Board of Agriculture, I beg to say that in my judgment the members of the Board of Agriculture will not be personally liable for any loss sustained through operation of the State Fair, unless their management and operation of the same would be grossly negligent or in bad faith.

The Board of Agriculture is a political body and its members are in the discharge of a public duty involving the exercise of governmental functions. It is the uniform holding of all the courts that in such circumstances the members are not personally liable except for gross neglect of duty or action in bad faith. *Hipp vs. Ferrall*, 173 N. C., 167, and cases cited.

In other words, so long as the Board of Agriculture shall exercise good faith and reasonable prudence in the operation of the Fair, the members will not be personally liable for any loss ensuing from such operation.

SUBJECT: SALE OF MILK; REGULATIONS OF DEPARTMENT OF AGRICULTURE

6 April, 1937.

In reply to your inquiry of April 5, I beg to say that in my judgment the fixing of quantities in which milk may be sold for retail consumption, that is to say, the quantity contained in the milk bottles, is within the power and authority of your Department, under C. S. 7251 (w) 4.

To be more specific, in my opinion it is within the power of the Department to make and enforce regulations fixing the contents of such bottles at one pint or one quart, as desirable.

It is clear to my mind that much deception might be practiced upon the public as to the contents of a given bottle of milk if the consumer had to rely upon labels or markings upon the bottle in order to see how much milk the bottle contained.

However, in my opinion, under the protection afforded by C. S. 8064 (p), the Department might permit the sale of milk in bottles containing a less quantity.

SUBJECT: AGRICULTURE; TAX ON AGRICULTURE LIME

4 June, 1937.

In our interview on the subject of tax on Agricultural Lime, you presented several situations and inquired whether or not the tax should be collected in such cases.

Recalling the substance of that conversation, I beg to advise:

1. Where Agricultural Lime is shipped from a point in Virginia, or other State, to Galax, Va., and there picked up and hauled into North Carolina for distribution in this State, no charge can be made upon the lime as shipped to Galax, Va., but when this lime is brought into the State and sold to persons within the State, it is liable to the tax.

2. Where a farmer must cross the State line and purchase Agricultural

Lime in Virginia, or elsewhere, for his own use, and brings it in North Carolina, it is not subject to the tax, as the imposition of such tax would impose a burden on interstate commerce.

3. Where a trucker purchases lime in Virginia, or another state, not for himself but for distribution in North Carolina, and brings it into North Carolina and so distributes it, the lime is subject to the tax.

4. Where lime is brought into the State and sold to a Federal agency, or to an agency of the State, it is not subject to the tax.

SUBJECT: AGRICULTURE; LIME TAX

7 June, 1937.

In my opinion, the State Highway and Public Works Commission should pay tax on lime sold by it, as such sale of lime is not in discharge of a governmental function. This opinion is based in part upon the attitude taken by our Supreme Court on this subject in *Town of Benson v. Johnston County*, 209 N. C., 751. If it is proper to levy a property tax on property of the State despite the apparent prohibition of the Constitution, on the theory that the State does not own such property for a governmental purpose, I can see no reason why an excise tax might not be levied upon lime sold by the Highway and Public Works Commission, for the still stronger reason that not only is the State, through its agency, not discharging a governmental function, but is engaging in a private enterprise, in competition with a legitimate private industry.

SUBJECT: REGISTRATION AND SALE OF CONCENTRATED COMMERCIAL
FEED STUFFS; INSPECTION LAW; INTERSTATE SHIPMENTS

15 July, 1937.

Receipt is acknowledged of your letter of July 14th. You refer to a shipment of feed from St. Elmo Mills of Chattanooga, Tennessee, sold by the Carolina Grocery Company of Hot Springs, North Carolina, to the Darling Bell School of Hot Springs, in which it is found upon inspection that the feed stuff contains 14% of protein against a guarantee of 24%. You state that you desire to penalize the St. Elmo Mills, but wonder if the feed law gives you authority to penalize an interstate shipment.

Under Article X (2) of the Federal Constitution, the State has a right to impose charges absolutely necessary for executing its inspection laws, and the imposition of such charges and the collection of same is not regarded as violation of the commerce clause, Article VIII, Sec. 3, or Article X, Sec. 2, of the Federal Constitution. Under Section 7 of Chapter 149, Public Laws of 1909, you are empowered to seize and sell any feed stuff which contains a smaller percentage of crude protein, etc., than it is certified to contain. The sale is to be made at the Courthouse door of the County in which the seizure is made in accordance with the procedure laid down in this section. Your remedy here would appear to be in accordance with the provisions of this Act. The State has a right to enforce the reasonable inspection laws passed for the purposes contemplated in Chapter 149, Public Laws 1909. I am, therefore, of the opinion that this law affords you very complete remedy and procedure in such cases. If the feed stuff is seized, condemned, and sold according to this law, the purchaser and

seller, the Carolina Grocery Company, would be relieved of legal obligation to pay for the shipment to the St. Elmo Mills.

SUBJECT: LICENSE TAXES; SALE OF FIELD SEEDS; PRORATING ACTS

17 July, 1937.

You inquire whether or not a person who desires to sell field seeds in this State during the last six months of the year is required to pay the full \$25.00 tax imposed under C. S. 4830. That statute reads, in part, as follows:

"4830. License tax for sale of seed. For the purpose of providing a fund to defray the expenses of the examination and analysis prescribed in this article, each person, firm, or corporation selling or offering for sale in or for export from this State any seed as mentioned in this article shall register with the Department of Agriculture the name of the person, firm, or corporation offering the seed for sale, and shall pay a license tax annually, on January first of each year, of twenty-five dollars (\$25.00). The commissioner's receipt for such money shall be license to conduct the business."

It can be seen from this statute that the tax is due annually and is payable on the first of January, as there is no provision for prorating the tax where the individual desires to engage in the business of selling field seeds for only a portion of the tax year. In our opinion, he would be required to pay the full \$25.00 fee.

SUBJECT: TAXATION; INSPECTION TAX; POLICE POWER

21 July, 1937.

House Bill No. 875 imposed an inspection tax of five cents per ton on the sale of agricultural lime. Mr. F. P. Nolan, Counsel for the Bertha Mineral Company, contests the right of the State to collect this tax from a Virginia Corporation which sells and delivers its product directly to purchasers in this State.

While it is recognized that a State has no authority to impose a tax upon an interstate transaction, it is equally well settled that it may, in the enforcement of its police laws, incidentally affect interstate commerce. A study of H. B. 875 clearly shows that it is a police, rather than a revenue, measure. In our opinion, the tax imposed by this Act for the purpose of enforcing the provisions thereof is valid as applied to sales made by persons from outside of the State to farmers located in the State. *Fertilizer Co. v. Thomas*, 181 N. C. 274; *Fertilizer Works v. Aiken*, 175 N. C., 398; *State v. Oil Company*, 154 N. C., 635.

SUBJECT: COTTON; FALSE PACKING

21 July, 1937.

Answering your inquiry upon the letter of Mr. J. M. Gloer, Jr., Secretary of the Atlantic Cotton Association, Atlanta, Ga., upon the above subject, I beg to say that any persons participating in the false packing of cotton, whether producer or ginner, would be criminally liable for the

fraud upon the sale of the cotton. There would be a civil liability also for the damage sustained.

SUBJECT: CREDIT UNIONS; SAVINGS DEPOSITS IN BANKS

9 August, 1937.

You have requested my advice with regard to the requirements of C. S. 5219 (3), which provides as follows:

"3. A credit union shall keep on deposit at interest in banks incorporated under the laws of the State of North Carolina and National Banks therein so much of the reserve fund and capital stock as shall equal five (5) per cent of the total liabilities."

You call my attention to correspondence with the Federal Reserve Bank of Richmond and to a letter from Mr. J. G. Fry, Vice-President, under date of June 29, 1937, from which it appears that under Regulations IV, as amended and effective February 11, 1937, the Federal Deposit Insurance Corporation prohibits any bank from accepting deposits of this character. Under regulations of the Federal Reserve Board, deposits of this character cannot be accepted by any National Bank or a Member Bank.

Under the circumstances stated, it becomes impossible to carry out the above quoted provision of C. S. 5219 as to the investment of 5% of the capital stock and reserve fund. The law does not require the doing of an impossible act. I am, therefore, of the opinion that it would be a substantial compliance with the requirements of this section and subsection to purchase with these funds either State or Federal bonds. Pending such times as these funds accumulate in sufficient quantities to invest in this manner, in my opinion, the Treasurer would be justified in carrying such funds on regular deposit in an approved bank.

SUBJECT: GUARANTY FUND; STATE COTTON BONDED WAREHOUSES

24 September, 1937.

Receipt is acknowledged of your letter of September 23rd in which you ask for my opinion as to whether or not the fund created under the provisions of North Carolina Code Section 4925(e), might be used for the purchase of test scales to be used in the Division of Weights and Measures of the Department of Agriculture. It is suggested that this Division does not have such scales or funds sufficient to purchase same.

In my opinion, the funds held by the State Treasurer collected under the law referred to, must be held exclusively "as a special guaranty or indemnifying fund to safeguard the State Warehouse System against any loss not otherwise covered." Under the express language of the terms of the statute by which this fund was created, this money could not be diverted for the purpose mentioned or for any other purpose.

SUBJECT: DEALERS' LICENSES; PLANT PEST REGULATIONS

4 October, 1937.

I have your letter of September 29th in which you refer to Section 11 of Plant Pest Regulations adopted by the Department of Agriculture, amended as recited in your letter, imposing a \$10.00 fee for a license. You inquire

as to whether or not chain stores and others operating from more than one place of business, would be required to pay the \$10.00 license for each separate place of business.

In my opinion, they would not be required to pay a \$10.00 license for each place of business. The wording of the Regulations does not admit of this construction. If it was intended to impose a payment of \$10.00 on each place of business, it would be necessary for the Regulations to so provide. In the absence of such provision, only one \$10.00 fee is collectible.

SUBJECT: COTTON WAREHOUSES; NEGOTIABLE RECEIPTS—GRADES STAMPED THEREON; LIABILITY FOR MISGRADING

21 October, 1937.

In connection with a number of matters under consideration at this time, I have been asked to render an opinion as to whether or not the warehouse issuing negotiable receipts guarantees the grade stamped upon such receipts under C. S. 4925 (k), and whether or not the State Guaranty Fund provided under C. S. 4925 (e) is liable for a loss sustained by the holder of the warehouse certificate for improper grading.

As to the liability of the warehouseman and such incident liability as might attach to the fund aforesaid, we may quote in the outset from C. S. 4925 (j), as follows:

"The said superintendent shall also have the power to sue, or to be sued, in the courts of this state in his official capacity, but not as an individual, except in case of tort or neglect of duty, when the action shall be upon his bond. Suits may be brought in the county of Wake or in the county in which the cause of action arose."

C. S. 4903 provides that the North Carolina Department of Agriculture and the North Carolina State College of Agriculture and Engineering, acting together as provided in Part 3 of Article 1, Chapter 84, relating to agriculture, (C. S. 4678 and following), acting jointly or separately, shall have the authority to employ expert cotton graders to grade cotton in this State under such rules and regulations as they may adopt. It is also provided that these institutions may seek the aid of the United States Department of Agriculture in the prosecution of this work, and shall have authority to enter into such contracts or arrangements as shall be mutually agreeable in furtherance of the object and purpose of the article.

C. S. 4904 provides that the County Commissioners may cooperate in this matter.

C. S. 4905 provides that the grader so employed shall have full right, power and authority to grade any cotton in North Carolina upon the request of the owner of the cotton, and that the grade pronounced by such grader shall be prima facie proof of the true grade or classification of the cotton, *and shall be the basis of all cotton sales in this State.*

The sections above referred to may be found in Michie's Code, last edition, and are from Chapter 175 Public Laws of 1915.

The North Carolina Cotton Warehouse System was set up by Chapter 137, Public Laws of 1921, and may be found in Michie's Code, last edition, inserted in connection with the foregoing laws as C. S. 4925 (a) to C. S. 4925 (u). It will thus be observed that the employment of expert cotton graders was not an essential part of the warehouse system, nor did such

graders have any connection with the warehouse system, except by the requirement of the laws relating to the latter with relation to grading the cotton upon its receipt in a State warehouse.

C. S. 4925 (k) (Michie's Code), requires that "as soon as possible after any lint cotton, properly baled, is received for storage, the local manager shall, *if not previously done*, have it graded and stapled by a *federal or state* classifier and legally weighed." This reference, of course, is to expert graders long before established by law. The section referred to provides further that official negotiable receipts shall be issued and that upon them shall be stamped the grade of the cotton so ascertained. However, upon request of the owner, the grading must be omitted from the negotiable receipt, and instead the receipt must be stamped "not graded or stamped on request of the depositor."

Of course, the State as a State does not guarantee such negotiable receipt in any respect whatsoever, but C. S. 4925 (e) provides a guaranty fund which may be resorted to under certain conditions and for certain purposes. The part of that statute pertinent to this inquiry reads as follows:

"4925 (e). FUND FOR SUPPORT OF SYSTEM; COLLECTION AND INVESTMENT. * In order to provide a sufficient indemnifying or guarantee fund to cover any loss not covered by the bonds hereinbefore mentioned, in order to provide the financial backing which is essential to make the warehouse receipt universally acceptable as collateral, and in order to provide that a state warehouse system intended to benefit all cotton growers in North Carolina shall be supported by the class it is designed to benefit, it is hereby declared:"

There follows a procedure for the collection of an indemnifying fund by the imposition of a fee of twenty-five cents per bale which it is said must be "paid into the treasury, to be held there as a special guarantee or indemnifying fund to safeguard the state warehouse system against any loss not otherwise covered."

On careful examination of the foregoing statutes, I am of the opinion that the state warehouse system does not guarantee the accuracy of the grading stamped upon the negotiable receipts, nor is the indemnity fund mentioned here liable for any loss arising out of the same, when the grading has been done by the Federal or State expert classifier authorized in the manner set out in the foregoing statutes to do the grading; and that such liability could only exist because of the bad faith on the part of the warehouseman having to do with the procurement of false grading or acquiescence therein.

My opinion in this respect is somewhat strengthened by the fact that the law requires the grading to be done by these Federal and State classifiers, who are not necessarily employees of the state warehouse system, and only in the event that such grading has not been done before the cotton is offered for deposit; and from the further fact that it is plainly stated in the law that the grading aforesaid,—and this independently of any deposit in the warehouse system,—shall be the basis of all sales of cotton in this State.

SUBJECT: ESCHEATS; UNCLAIMED PENALTIES PAID BY FERTILIZER COMPANIES UNDER SECTION 12 OF THE NORTH CAROLINA FERTILIZER LAW OF 1933, AS AMENDED

26 October, 1937.

You advise that certain fertilizer companies have made certain payments to the Department of Agriculture of penalties imposed by Section 12 of the North Carolina Fertilizer Law of 1933, as amended. These payments are made in cases in which the fertilizer companies are unable to ascertain the name of the person who used the fertilizer, and are paid to your Department on account of not knowing the person entitled to receive the payment. You inquire as to what should be done by you with these payments.

Under Code Section 5786 all unclaimed sums of money in the hands of any person which have not been claimed for a period of five years, are deemed derelict property and shall be paid to the University of North Carolina. If you hold these funds for a period of five years, under this section the same might be paid to the University.

SUBJECT: CREDIT UNIONS; INTEREST RATE CHARGEABLE ON LOANS

9 November, 1937.

Receipt is acknowledged of your letter of November 6th in which you inquire as to whether or not credit unions have a right to make an interest charge of one per cent per month on unpaid balances. In your letter you quote C. S. 5221, which provides that no corporation organized pursuant to this law shall charge or receive any interest, discount, or consideration, other than the entrance fee, greater than the legal rate.

This quotation, it seems to me, fully answers your question. The legal rate of interest in North Carolina is six per cent, and, therefore, the credit unions would have no right to charge a rate of one per cent a month on unpaid balances, which would be equivalent to twelve per cent.

SUBJECT: LICENSE ON SALE OF OLEOMARGARINE; DEFINITION OF WHOLE-SALER OR DISTRIBUTOR, CHAPTER 229, PUBLIC LAWS OF 1931

18 December, 1937.

Section 3 of Chapter 229, Public Laws of 1931, reads in part as follows:

"If the said application is satisfactory to the State Commissioner of Agriculture, there shall be issued to the applicant a license authorizing him to engage in the manufacture or sale of oleomargarine, * * * : if a manufacturer, one thousand dollars (\$1,000.00) annually; if a wholesaler or distributor, the sum of one hundred dollars (\$100.00) annually."

You have inquired of this office as to the definition and meaning of the words employed therein,—“wholesaler or distributor.”

The words wholesaler or distributor as used in this section mean the same thing, the statute using the terms wholesaler and distributor interchangeably. The statute places the tax of \$1000.00 upon the manufacturer, and the tax of \$100.00 annually upon the wholesaler or distributor. The wholesaler or distributor is the person, firm, or corporation which purchases oleomargarine for the purpose of reselling it to retail merchants for retail sales. Each person, firm, or corporation engaged in the business

of selling oleomargarine as a wholesaler or distributor to the retail merchant is required to pay the annual tax of \$100.00. The fact that such wholesaler or distributor has purchased the oleomargarine from a manufacturer who pays the license tax does not exempt the wholesaler or distributor from paying the annual tax of \$100.00. The retail merchant is not required to pay any tax at all.

The manufacturer who has paid the \$1000.00 annual tax is not required to pay this tax upon each separate place in this State which he may maintain and own for the distribution of his product.

SUBJECT: STATE CHEMIST; DUTIES; EXAMINATION OF HUMAN VISCERA TO DETECT POISONS IN CRIMINAL CASES

29 December, 1937.

I have your correspondence upon the above subject, and note that the stomach of Mrs. Eva Clontz Duckworth has been sent to the State Laboratory of Hygiene for examination, and from the State Laboratory of Hygiene to you for examination, to detect the presence of poison drugs. You inquire whether or not it is your duty to make the examination.

I think not, as the analysis is requested apparently for use in a criminal charge against some person for murder.

Of course, the stomach should be analyzed somewhere, but, as is suggested in your letter to Dr. Ervin, this might be done at several places where such examinations are accustomed to be made, and where I know, from handling appeals in criminal matters in the Supreme Court, they are satisfactorily made.

But as to your duties, I think they should be confined to the general purposes of the Agricultural Department. I note that for a different purpose altogether you do make examination of suspected poison in foods and feeds for domestic animals. It seems to me that this should cover your duty in that regard.

OPINIONS TO BUDGET BUREAU

SUBJECT: RADIO SERVICE; CHAPTER 324, PUBLIC LAWS 1935

17 August, 1936.

In answer to your inquiry, I wrote you on the above subject on March 4, 1936. I find nothing to change in the opinion I gave you at that time upon an analysis of this statute.

However, after the meeting of the Advisory Budget Commission to consider this subject, I am asked more particularly with regard to the provisions of the bill relating directly to the approval of the Advisory Budget Commission of the order of the Director of the Budget, should the same be made under Section 6 of the chapter.

The action of the Advisory Budget Commission under Section 6 of the chapter is not ministerial in its character. Such an interpretation would be inconsistent with the terms employed. The Advisory Budget Commission may approve or disapprove of the order of the Director of the Budget, and this necessarily involves discretion. Moreover, if it was intended that it should be mandatory on the Advisory Budget Commission to approve this order, it really would not have been necessary for the Act to have required any action whatever on their part.

It must be further observed that the Act does not appropriate any fixed sum for the establishment and maintenance of the radio service, nor does it even set a maximum or minimum limit.

In my opinion, the considerations which may enter into the approval or disapproval of the transfer of funds for this purpose, so as to make the same a valid charge against the appropriation item of Betterments for State and County Roads, cannot be fixed as a matter of law so that the discretion which is given the Advisory Budget Commission may be completely controlled and restricted as a matter of law. In my opinion, the Budget Commission may take into consideration all the facts of the case: The demands which are made or may be made upon the fund for other purposes; the manner and extent to which the highway funds are required to be spent, and should be spent for this particular purpose; and any other consideration which might have a pertinent bearing. While perhaps they are not called upon to fix the amounts which are necessary to make the radio installation and maintain it, I think the Advisory Budget Commission may very well consider this matter, as it relates to the propriety of making available the funds in the manner set out in Section 6 of the Act.

Ordinarily the approval or disapproval of a particular act, or transaction, or subject, involving a discretion in those who exercise such right of approval or disapproval, is not reviewable as a matter of law; and this means, of course, that the law does not minutely go into the reasoning or the facts by which the sound judgment of those exercising the discretion may be controlled.

I think this covers the ground of our discussion on the subject at the meeting of the Commission. I will be very glad to give you any further assistance you may desire.

SUBJECT: SALARIES AND FEES; RE MISS MARSHBANKS

24 September, 1936.

I regret delay in answering your recent letter with regard to the salary of Miss Marshbanks. I understand from your letter that Miss Marshbanks is classified as stenographer-secretary and receives now the maximum salary allowable to an employee in that classification. However, Miss Marshbanks has had to perform additional duties not within this classification which have become very necessary in the Department of Education. These duties relate to the lands belonging to the State Board of Education known as "swamp lands" or lands belonging to the Literary Loan Fund. Her duties in this respect are arduous, and the situation with regard to the lands owned by the State Board of Education involves great activity. Furthermore, Miss Marshbanks is called on to perform additional duties required by the establishment of the Text Book Rental Commission.

I am referred to a ruling of Mr. Brummitt to the effect that while an employee of the State may receive pay from two sources, such employee can hold only one position. I think Mr. Brummitt must have had in mind two distinct positions created by statute, as I know of no legal reason why an employee of the State might not perform functions totally unlike and unrelated and receive either a single or a composite salary for such combined services. There is sufficient precedent for this.

I realize the necessity of adherence to classification in order to preserve uniformity as to salaries, but instances of this sort are certain to arise occasionally, because there are some duties not capable of convenient classification, and I am of the opinion that there is no legal reason why Miss Marshbanks should not receive additional compensation on account of the extra duties which have been placed upon her.

SUBJECT: STATE WAREHOUSE SYSTEM; EMPLOYMENT OF GIN EXPERT
AND MECHANIC

18 May, 1937.

Consolidated Statutes, Article 17, Sections 4901 to 4925 (u), relate to the regulation of subjects connected with the production and marketing of cotton, and Section 4925 (e) is intended to provide a fund for the maintenance of the State Warehouse System and for indemnity against loss by reason of negotiable certificates for the storage of cotton. This section provides for a levy of twenty-five cents per bale on cotton ginned within the State during the year.

It seems advisable, in order that the producers of cotton shall not sustain loss by improper and inefficient ginning, that in connection with this State Warehouse System a gin expert and mechanic may be employed for the purpose of inspecting ginning operations and reporting on the same to the Department of Agriculture or to the Superintendent of the State Warehouse System.

In my opinion, the employment of such a person, to be paid out of the fund thus provided, if approved by the Advisory Budget Commission, may be consistently made under authority of the law and his salary or compensation fixed by the Director of the Budget. See C. S. 4676 and 4925 (d).

SUBJECT: ADMINISTRATION OF THE ACT FOR OLD AGE ASSISTANCE AND AID TO DEPENDENT CHILDREN AS BETWEEN THE STATE BOARD OF CHARITIES AND PUBLIC WELFARE AND THE COUNTIES

24 May, 1937.

Your letter of May 19, on the above subject, has received my further careful consideration. You inquire as to whether you would be authorized to take part of the money from the appropriation under Section 1, Subsection 5, for county administration, to carry on this work. You state that it would necessarily take a considerable amount of this money to carry on the work of writing the checks here at Raleigh, but that it can be carried on at much less cost than in the counties. You ask as to whether or not Section 6 of this act, allowing the Director of the Budget to make transfers between the appropriations under Section 1 of the act, would allow the Director of the Budget and the State Board of Charities and Public Welfare to transfer from appropriations in Section 1, Subsection 5 and Subsection 4, to carry on this work or to make a charge against Subsection 5 of Section 1, for the amount necessary to carry on this part of the work.

The appropriation made in Section 1, Subsection 5, in my opinion, could not be so transferred as to take this money away from expenditure within the counties to pay all the costs of administration within the counties. The act contemplates that the payment of claims for old age assistance and for dependent children shall be made by the counties in the usual manner in which county funds are disbursed. This contemplated, the machinery of these payments should be provided by the counties. This, in part, was the expense of administration within the counties, a part of which was to be borne by the State under the provisions of the act. The appropriation, therefore, is made for the expenditure by the counties in carrying out the plan laid down by the law and not by administrative ruling for disbursement of the funds. Being a question of withdrawing from other governmental agencies, an appropriation made for their use and benefit, the usual rule of transfers as between funds in a department or appropriation would not obtain. In my opinion, it could be done only by an express agreement with all of the counties, in which they would waive any claim for that part of the funds set up in Section 1, Subsection 5, which might be expended for this purpose.

SUBJECT: AUTHORITY OF BUDGET BUREAU TO REQUIRE AND DIRECT
INSTALLATION OF MODERN ACCOUNTING SYSTEM

28 June, 1937.

Receipt is acknowledged of your letter of June 24, which is as follows:

"The question has arisen concerning the authority of The Budget Bureau in some of its details regarding the installation and construction of accounting systems for State departments. Under Section 23 of Chapter 100 of 1929, the authority is granted to determine whether departments or institutions have proper accounting systems and to require and direct that adequate systems be installed.

"The question has arisen as to how far this authority reaches into the matter of determining what kind of forms may be used or whether any specific kind or make of machine may be specified to do the particular job that is required. The Division of Purchase and Contract has taken the attitude that The Budget Bureau does not have the right to prescribe any

one accounting form to be used because of the fact that this might only fit one make of machine. I would like to call your attention to the fact that probably no two makes of machines will handle any one specific kind of form. The machine used is a vital part of any system that is set up, and if the Division of Purchase and Contract should carry on as it is they would be the ones prescribing accounting systems and not The Budget Bureau.

"I would like to have your opinion as to what is proper in this whole affair, stating now that your opinion, whatever it may be, will be satisfactory with me. I understand that you have ruled orally for the Unemployment Compensation Commission, and I shall appreciate this in writing."

Under the 1925 Budget Act, as amended (C. S. 7486 (gg)) the Director of the Budget has authority to install, in any State Department, such "modern" system of accounting as will result in a correlated and controlled account of the activities of the Department. It is clear that general systems of accounting may not be adequate for the specialized activities of a Department which make it necessary that the record should manifest details peculiar to the administrative necessities of that Department.

The record itself is the important matter, and the mechanical means by which this record is placed upon the books is secondary. In my opinion, the Director of the Budget, as executive head of the Budget Bureau, may lawfully decline to approve an expenditure for any mechanical device which will not adequately meet the requirements of the accounting system installed under this authority.

Where possible, it is the policy of the State to instigate competition as an aid to provide control in the purchase of its products. Sometimes, particularly in the purchase of scientific instruments and modern devices of a specialized type, this is not found to be feasible, on account of the restricted field of choice, and of design and manufacture. In such a case the Division of Purchase and contract cannot require the specifications to be changed so that mechanical devices clearly inadequate may be let into the competition.

The system of accounting adopted by the Director of the Budget in all cases is expected to be fair and adequate and without capricious discrimination. When set up in good faith, however, that is primarily, at least, a consideration for the Budget Department and not of the Department in which the system is installed.

SUBJECT: RELATION OF BUDGET BUREAU TO FUNDS OF STATE DRY
CLEANERS' ASSOCIATION

8 July, 1937.

In your letter of July 7th you inquire as to the responsibility of the Budget Bureau with regard to the State Dry Cleaners' Association fund, in view of the fact that this fund is required by law to be paid into the general fund of the treasury.

The bill is very awkwardly drawn, and this unfortunate provision is totally unlike that of any other of the statutes creating boards and commissions regulating different classes of business.

However, you will note that Section 6 of the law specifically appropriates all of the funds so paid into the treasury to the State Dry Cleaners Association for the purpose of administration and enforcement of the Act.

In my opinion, this feature of the Act renders it unnecessary that the Budget Bureau should have anything to do with the handling of the fund. In my opinion, it would be only necessary for the proper officers of the State Dry Cleaners' Association to make requisition and the funds could then be paid to the Commission for disbursement, up to the limit of such fund in the hands of the State Treasurer, upon warrant of the Auditor.

In other words, I do not think that this fund is subject to allotment and other provisions of the Budget Act, nor is the Dry Cleaners' Association subject to the provision of the Personnel Act.

SUBJECT: CHAPTER 242, PUBLIC LAWS 1937; FREE TUITION AT STATE INSTITUTIONS FOR ORPHANS OF WORLD WAR VETERANS; JOHN OLIVER RANSON

5 August, 1937.

We have a letter from Mr. Charles T. Woollen, Controller of the University of North Carolina, which was referred to this office by the Budget Bureau. The letter refers to the application of John Oliver Ranson, who has applied to the University at Chapel Hill for admission to undergraduate work and for aid under Chapter 242, Public Laws of 1937, providing for educational advantages in State Institutions to World War orphans.

We find that under the provisions of the Act, the only proper charges upon the contingent and emergency fund of the State are those of room and board, as listed in Mr. Woollen's letter. We find no reference in the Act to "fees." As for the tuition item, the Act provides that such children shall be entitled to and granted a scholarship of free tuition. Therefore, we feel that the charges for such tuition are not proper charges against the contingent and emergency fund under the provisions of the Act.

SUBJECT: WINDFALL TAXES; LIABILITY OF STATE INSTITUTIONS;
FEDERAL RETURNS

31 January, 1938.

I have before me a letter to you from Mr. R. M. Purser, Business Manager of the State Hospital at Goldsboro, attaching correspondence relative to the federal tax known as the windfall tax or unjust enrichment tax. Mr. Purser refers to and quotes a letter from Mr. C. H. Robertson, Collector, in which was sent to him Federal Form No. 945 for his execution.

The federal tax to which reference is made is an income tax specially imposed and directed at processing taxes collected by processors under the Act of Congress known as the Agricultural Adjustment Act, which was in this respect declared unconstitutional by the United States Supreme Court. The federal government does not and cannot impose an income tax upon the State of North Carolina, or any of its agencies or subdivisions, and, therefore, in my opinion, there is no liability for making returns or payment of this tax imposed by the federal law upon the State Hospital at Goldsboro.

The letter received from the Collector, Mr. Robertson, was doubtless a mere form letter sent to all who were known to have been the recipient of the refunds. In addition to this, the refunds made to the purchaser as a charitable institution were in accordance with the federal law and, therefore, do not fall within the provisions of the windfall taxes.

OPINIONS TO UTILITIES COMMISSIONER

SUBJECT: FRANCHISE CARRIERS; CONTRACT HAULERS; PROTECTION OF
FRANCHISE CARRIERS—SECTION 8 OF THE BUS LAW

23 April, 1938.

It is unnecessary to say that the distinctions which separate franchise carriers and contract haulers are sometimes almost indefinable. Sometimes every single transaction which can be thought of in a hypothetical way as showing a tangible distinction might be performed by a contract hauler or by a franchise carrier. It is therefore necessary to consider the operations of either of them as a whole, rather than by analysis, in order to determine whether a contract hauler has really invaded those exclusive prerogatives and rights which the Legislature intended to confer upon the franchise carrier.

Since the State taxes the franchise carrier very substantially for certain privileges which it extends, and which it does not intend to extend to the contract hauler, the rights and privileges of the franchise carrier, of course, should be protected; that is, they should get what they are supposed to pay for, and while the distinctions are sometimes hard to make, they are of very great importance to all parties concerned.

I am of the opinion that Section 7 of the Bus Law does not confer upon the Utilities Commissioner the power to regulate the number of contracts which a contract hauler must have in order to prevent his classification as a carrier required to have a franchise, or classify him as one invading the prerogatives of a franchise carrier. It seems to me that this question must be settled by the Commissioner by an investigation and examination of the whole picture presented of the activities of the supposed contract hauler and applying the definitions contained in the law, and taking into consideration all of the conditions under which the contract hauler operates, not any particular phase of it. It could then be determined whether the type of his operations approach so nearly that which the State has adopted as requiring a certificate of convenience and necessity as to require a classification as a franchise carrier.

For that reason and because there are so many facts involved and so many different situations arising, it would be impossible for us to incorporate in this letter all of the conditions and circumstances which would impose upon the carrier the necessity of operating as a franchise carrier or come under the ban of the statute as invading the prerogatives of a franchise carrier.

For that reason, it seems to me that where there is substantial reason to believe that a contract hauler has violated the provisions of this Act, it should be the duty of the Utilities Commission to proceed under the provisions of Section 8 of the Bus Law in order that the practice, if offensive against the law, may be prohibited.

SUBJECT: FRANCHISE MOTOR VEHICLE CARRIERS; TAXATION BY
CITY ORDINANCE

16 October, 1937.

For some time, as stated by you in your letter of October 13th, our Reve-

nue laws have had the provision which is now subsection (b), Section 61, Chapter 407, Public Laws of 1937, which reads as follows:

"That no additional franchise tax, license tax, or other fee shall be imposed by the State against any franchise motor vehicle carrier taxed under this Act, nor shall any county, city, or town impose a franchise tax or *other fee* upon them."

This, of course, absolutely prohibits a city or town from taxing a motor vehicle carrier operating under a State franchise and paying a State franchise tax under the Revenue Act, and a privilege license tax imposed by any town is invalid because of this prohibition by the State law.

OPINIONS TO COMMISSIONER OF INSURANCE

SUBJECT: BUILDING AND LOAN ASSOCIATIONS; JOINT OWNERSHIP
OF STOCK SURVIVORSHIP

15 August, 1936.

I have your letter of August 13, acknowledging my letter of August 12. It is noted that your exact question is whether or not a building and loan association may issue stock to joint owners with the right of survivorship.

C. S. 1735 abolishes survivorship in joint tenancy in real and personal property. Our court, however, has held in the case of Taylor vs. Smith, 116 N. C. 531, that this Section abolishes survivorship where the joint tenancy would otherwise have been created by law, but does not operate to prohibit persons from entering into verbal contracts as to land or verbal agreements as to personalty, such as to make future rights of the parties depend upon the fact of survivorship.

I am not advised of any restriction in our law against ownership of stock in a building and loan association by two or more parties with rights of survivorship provided for by express contract entered into between them, set out in the certificate of stock or by other agreement. I am, therefore, of the opinion that by convention stock might be issued to two persons with the right of survivorship, which would be valid as between them and the issuing company.

Other questions might arise to affect the validity of the convention, i. e., whether or not it was an incomplete gift from one party to the other or testamentary in character or whether or not it was a transfer to avoid creditors. These questions, however, need not be passed upon by the issuing building and loan association. They may validly issue the stock at the request of joint purchasers.

SUBJECT: BUILDING AND LOAN ASSOCIATIONS; ERECTION OF HOUSES

19 March, 1937.

Building and Loan Associations are creatures of statute and have only those powers which are given to them by statute or which must come by either a necessary or reasonable inference therefrom.

While it is true that some latitude is necessarily allowed such associations with regard to the investment of surplus funds, it is not my opinion that this particular form of investment is open to them under the law. I can see nothing which authorizes them to go into the real estate business on such a scale.

SUBJECT: LICENSES; ELECTRICAL CONTRACTORS

13 May, 1937.

In your letter of May 7th you inquire whether or not House Bill 169, which sets up an Examining Board for Electrical Contractors and requires that they be licensed, relieves such licensee from taking out a general contractor's license for electrical contracts of over \$10,000.00.

Section 5 of House Bill 169 provides that no person shall engage in elec-

trical installations "for which a permit is now or may hereafter be required" without obtaining a license. There are two provisos to this section but, in our opinion, neither of these apply to those persons who are required to obtain a general contractor's license under C. S. 5168 (cc). It follows, then, that a general contractor would be required to obtain a license under House Bill 169, irrespective of the amount involved in the electrical contract.

Considering the converse of this situation for a moment, let us see whether or not one who has obtained a license under House Bill 169 is required to also obtain a general contractor's license under C. S. 5168 (cc). Section 11 of House Bill 169 provides as follows:

"Nothing in this Act shall relieve the holder or holders of license issued under the provisions hereof from complying with the building or electrical codes, or statutes, or ordinances, of the State of North Carolina, or of any county or municipality thereof, now in force or hereafter enacted."

In our opinion this section has the effect of negating the general repealing clause of House Bill 169 and leaving in existence the present statutes pertaining to building or electrical contracts. Consequently, one who obtained an electrical contract of over \$10,000.00 would necessarily have to have a general contractor's license, under C. S. 5168 (cc).

SUBJECT: BUILDING AND LOAN ASSOCIATIONS; FEE CHARGED FOR
GRANTING MORTGAGE LOAN

18 October, 1937.

C. S. 5182 provides that building and loan associations may lend only to shareholders, and to such shareholders for no greater amount than the par value of the shares held by such shareholder. Section 5176 provides that associations organized under the chapter on cooperative organizations may prescribe the entrance fee per share to be paid by each shareholder, not to exceed one per cent of the par value of each share.

Should the building and loan association provide in a by-law that such entrance fee is to pay the expenses of a mortgage loan, and such expenses are less than the fee charged, in my opinion the amount of fee in excess of the expenses may be retained by the association, because of the proviso contained in C. S. 5176, which, I think, permits the association in its discretion, and without review of such discretion, to charge one per cent of the par value of each share of stock,—considering, of course, that the amount charged does not exceed this. It must not exceed this, in any event.

SUBJECT: LICENSE FEES; AMOUNT REQUIRED TO BE PAID

14 March, 1938.

In answer to your inquiry in conference this morning with reference to the application of C. S. 6320, I beg to advise you that in my opinion, the maximum fee to be charged in the case of any one insurance company is limited to the sum of \$350.00 per annum. This limitation is provided in C. S. 6320. It is understood that the contention is made by an applicant for license that under the language of this section, it is not required to pay more than \$200.00. This contention is not supported by a close exam-

ination of the section. The provision upon which reliance is placed by the applicant, reads as follows:

"But upon the payment of the largest license fees provided in this chapter for any one business done, a life insurance company may do a health business, and a fire insurance company may insure against loss or damage to property by lightning, wind, hail, or tornado, etc."

The phrase "for any one business done" follows the provision in the statute which says:

"No insurance company admitted to do business in this State shall be authorized to transact more than *one class or kind of insurance therein, unless it pays the license fees for each class.*"

The subsequent limiting above quoted refers to "any one business done." Any one business done may include several classes or kinds of insurance conducted by a company. It is impossible to read the section and give it meaning and effect, except from this standpoint.

SUBJECT: LISTING AND TAXING OF BUILDING AND LOAN ASSOCIATIONS' CASH ON HAND OR IN BANK UNDER SECTION 1501 OF THE MACHINERY ACT OF 1937

5 April, 1938.

I have your letter of April 4th as to liability of a Building and Loan Association for listing and assessing cash on hand and in bank under Section 1501 of the Machinery Act.

Section 1501 of the Machinery Act provides that a building and loan association organized or doing business in this State shall list with the local assessors all tangible real and personal property owned on the day as of which property is assessed in each year, including all cash on hand or in bank on that date, which shall be assessed and taxed *as like property of individuals*. Under the intangible tax provided by the Revenue Act of 1937, a tax is imposed under Section 701 on bank deposits and by Section 702 on money on hand. By Section 704 a tax is imposed upon evidences of debt by building and loan associations other than obligations and on account of shares of stock. Under this section, a building and loan association is required to report and pay the tax imposed, charging the same against the account of the depositor.

By Section 714 it is provided that none of the taxes imposed by Schedule H on intangible personal property shall apply "to building and loan associations paying a tax under Section 138 of the Revenue Act" except the tax imposed by Section 704 above referred to.

By this provision the tax on bank deposits provided by Section 701 and the tax on money on hand provided by Section 702 is made inapplicable to building and loan associations paying a tax under Section 138 of the Revenue Act. I am, therefore, of the opinion that under this exclusion a building and loan association is not liable for the tax on bank deposits provided by Section 701 or the tax on money on hand provided by Section 702.

It then becomes necessary to reconcile what is meant by Section 1501 of the Machinery Act, which requires the building and loan associations to list for local assessment all cash on hand or in bank which the section

states "shall be assessed and taxed as like property of individuals." Like property of individuals would be taxable under Sections 701 and 702.

Section 1503 of the Machinery Act provides as follows:

"None of the provisions contained in any section of this article shall be construed to conflict with Article VIII, Schedule H, of the Revenue Act, but rather shall be subordinate thereto."

Section 700 of the Revenue Act provides in part as follows:

"Intangible personal properties defined and classified by this chapter, with the exceptions hereinafter made, are hereby segregated for exclusive State taxation after the year 1937 and at the same time stated in this article and shall be taxed as hereinafter provided."

The above quoted language would be in conflict with that part of Section 1503 of the Machinery Act which requires a building and loan association to list for local taxation cash on hand and money in bank.

By virtue of the above quoted provisions of the Revenue Act of 1937 and the Machinery Act of 1937, there is a conflict, which by reason of the provision of Section 1503 of the Machinery Act would yield in favor of the provisions of the Revenue Act. It is, therefore, my opinion that a building and loan association paying tax under Section 138 of the Revenue Act, is not liable for tax on bank deposits and money on hand under the provisions of Sections 701 and 702 of the Revenue Act and is not required to list such property for local taxation.

OPINIONS TO ADJUTANT GENERAL

SUBJECT: ARMORIES; LEASE OF BUILDING; LIABILITY FOR DAMAGE

6 August, 1937.

We have your letter of August 5th relative to the lease executed by the Commanding Officer of Battery "D" 113th Field Artillery of the National Guard and Mr. E. H. Williams for a building situated in the Town of New Bern, North Carolina, and used as an armory.

It is noted that the lease is executed not by the State of North Carolina, but by the Commanding Officer of Battery "D," and we are of the opinion that there is no liability on the part of your Department for any damage done to the building, nor for any amount due or which might accrue under the terms of the lease so executed. We are also of the opinion that no funds belonging to the State of North Carolina and allocated to this Battery to defray necessary expenses, would be subject to attachment by this claimant in this connection.

OPINIONS TO THE COMMISSIONER OF LABOR

SUBJECT: CHILD LABOR LAW OF 1937; CERTIFICATE OF EMPLOYMENT FOR MINORS; NEWSPAPER BOYS; RELATIONSHIP OF EMPLOYER AND EMPLOYEE

21 June, 1937.

You state in your letter of June 17, that the Child Labor Law of 1937, Chapter 317, requires that a certificate of employment shall be procured by any person employing a minor under eighteen years of age; if the relationship of employer and employee does not exist between minor engaged in street trade and the Supplier of the merchandise which the minor sells, the parent or guardian of the child shall be deemed the employer of the minor and shall procure the certificate of employment required. You ask whether or not in the case of a newspaper carrier who delivers papers on a fixed route, the relationship of employer and employee exists between the carrier and the newspaper company, or whether the carrier is an independent contractor so that the parent instead of the newspaper company would have to procure the certificate of employment.

It seems clear that the relation of employer and employee exists between the minor and the newspaper company in this case. The case of which you ask is distinguishable from that of the boy who buys his papers over the counter and sells them on the streets to any customer he can find. It has been held that the newspaper boy who does not have a fixed route and who uses his own devices to sell his papers to any customer he can find on the street is not in the relationship of employer and employee with the newspaper company: *Creswell vs. The Charlotte Publishing Company*, 204 N. C., 380; *New York Indemnity Company vs. Commissioner*, 1 Pac. (2d) 12 (Cal.), but it has also been held that when the newspaper boy carries a fixed route which is under the control of the newspaper company, and when the boy must deliver the papers to all the subscribers on the route, the newspaper carrier is the employee of the newspaper company: *Globe Indemnity Company vs. Commissioner*, 284 Pac., 661 (Cal.).

Therefore, in our opinion, the newspaper boy employed by The News and Observer to carry a fixed route is the employee of the company and The News and Observer must procure the certificate of employment.

SUBJECT: MAXIMUM HOURS LAW; LEARNED PROFESSIONS; BARBERS AND COSMETOLOGISTS

21 June, 1937.

In your letter of June 17, you raise the question as to whether or not barbers and cosmetologists should come under the provisions of the maximum hours law of 1937, which exempts from its provisions parties who are engaged in "learned professions."

In the opinion of this office, barbers and cosmetologists are not members of learned professions and, therefore, would not come under the exemption. In Words and Phrases, 1st series, page 4043, it is said:

"We speak of the professions of law, medicine, and divinity as learned professions, and also of the profession of arms. * * * it is not unusual now to regard the occupation of civil or mining engineer or an electrician as a learned professional occupation

* * * but we do not speak of or understand the business of a merchant or blacksmith or carpenter or tailor as falling properly within the designation of professional occupations."

In the Federal Courts, it has been held that expert accountants are not members of learned professions. The Federal Court said:

"Certainly, in the ordinary use of language, an accountant, however expert he may be, would not be included as belonging to one of the learned professions." In *Re Ellis*, 124 Fed. 637.

In our opinion, barbers and cosmetologists are no more members of learned professions than are tailors or accountants. It is true that they have an occupation which requires some degree of special knowledge, but not enough special knowledge to make it a learned profession. Hence, they should come under the maximum hours law.

SUBJECT: 1937 STATE MAXIMUM HOUR LAW; APPLICATION TO EIGHT OR MORE IN MERCANTILE ESTABLISHMENT

23 June, 1937.

You make the following inquiry:

"Mr. A employs 12 persons in his retail store, 5 men clerks and 7 women clerks. Does the new State Maximum Hour Law apply to him?"

Section 3 of the Act referred to provides as follows:

"Section 3. No employer shall employ a female person for more than forty-eight hours in any one week or nine hours in any one day, or more than six days in any period of seven consecutive days. No employer shall employ a male person for more than fifty-five hours in one week or more than 12 days in any period of 14 consecutive days, or more than 12 hours in any one day"; here follow certain exceptions, amongst which we find: "Nothing in this section or any other provisions of this Act shall apply to . . . employers employing a total of not more than eight persons in each place of business."

This Act was amended by "S. B. No. 491," by adding to Section 3 the provision:

"Provided that this Act shall not apply to male clerks in mercantile establishments."

It has been contended that this so modifies the Act as to make it apply only to mercantile establishments where eight or more female clerks were employed.

While the question may be considered close, in my opinion, this interpretation is incorrect.

It appears to have been the intention of the Legislature to limit the application of the Act to those mercantile establishments in which a total of eight or more persons were employed, regardless of sex, and the proper interpretation of the amendment is that it prevents the restrictions as to hours of labor, etc., from applying to male clerks.

This interpretation has the justification of authority and reasoning. The concession in the statute may have been made to the small employer on account of his less favorable economic status or the difficulty and expense of applying the law to those employing a small number of persons, or it may be due to the fact that the protected class might have to endure greater

burdens in a larger or busier establishment; but, at any rate, the amendment to the statute is not sufficiently direct and pointed, in my opinion, to justify us in concluding that it was meant that the law should apply to mercantile establishments only employing eight or more women rather than to those where the total employment, regardless of sex, is eight or more. I think the latter to be the proper construction of the statute.

SUBJECT: CHILD LABOR LAW OF 1937; EMPLOYMENT OF MINORS IN PLACES WHERE ALCOHOLIC LIQUORS ARE SOLD, ETC.

10 July, 1937.

Receipt is acknowledged of your letter of July 9th, having reference to Section 7 of Chapter 317, Public Laws of 1937, which provides in part as follows:

"Nor shall any minor under eighteen be employed or permitted to work in, about, or in connection with any establishment where alcoholic liquors are distilled, rectified, compounded, brewed, manufactured, bottled, sold or dispensed, or in a pool or billiard room."

You inquire as to whether or not beer and wine are to be considered as "alcoholic liquors" within the purview of this statute. It is noted that Representative Vogler and Senator Bell, of Mecklenburg County, have expressed the opinion that this law should not apply to alcoholic beverages which may be sold in dry territory.

I regret to state that the statute as written does not permit of this construction. The language employed by the General Assembly is such that no doubt is left as to its meaning. Wine and beer fall within the definition of alcoholic liquors and such being the case, the provisions of the statute exclude the employment of minors under eighteen at places in which beer and wine are sold. I am enclosing you a copy of a letter to Mr. Hunter M. Jones, Attorney At Law, Charlotte, N. C., under date of July 6, 1937, in which the opinion was expressed that minors under eighteen cannot be employed in chain grocery stores where bottled beer is sold.

It may be that the language of the General Assembly in the Act has much broader significance than was intended and that if the effect of its enactment had been fully understood, the provisions in this respect would not have been so severe. Unfortunately, we can only construe the law as it was written and ascertain the purpose of the General Assembly from its enactments and the language employed therein, where there is no ambiguity or uncertainty. I can readily see how enforcement of this provision may cause some very unexpected and what might be regarded as unfortunate results.

RE: MAXIMUM HOUR LAW; INTERPRETATION

11 August, 1937.

You inquire of this office for an interpretation of the provisions appearing in Section 3 of Chapter 409 of the Public Laws of 1937 known as the "Maximum Hours law."

Section 3 provides as follows:

"No employer shall employ a male person for more than fifty-five hours in any one week, or more than twelve days in any period of fourteen consecutive days or more than ten hours in any one

day, except that in case where two or more shifts of eight hours each or less per day are employed, any shift employee may be employed not to exceed double his regular shift hours in any one day whenever a fellow employee in like work is prevented from work because of illness or other cause: Provided, in case of emergencies, repair crews, engineers, electricians, firemen, watchmen, office and supervisory employees and employees engaged in hereinafter defined continuous process operations and in the work, the nature of which prevents second shift operations, may be employed for not more than sixty hours in any one week: Provided, also, that the ten hours per day maximum shall not apply to *any* employee when his employment is required for a longer period on account of an emergency due to breakdown, installation or alteration of equipment: Provided, that boys over fourteen years of age delivering newspapers on fixed routes and working not more than twenty-four hours per week, and watchmen may be employed seven days per week" * * * * .

Repair crews, engineers, electricians, firemen, watchmen, office and supervisory employees, and employees engaged in certain continuous process operations, and in work the nature of which prevents second shift operations in case of emergencies may be employed for not more than sixty hours in one week. This provision restricts the sixty hour week provision to cases of emergencies for the employees named above.

Any employee may work in excess of ten hours per day when his employment is required for a longer period on account of an emergency due to breakdown, installation, or alteration of equipment, but such employee unless he falls within the classification of repair crew, engineer, electrician, fireman, watchman, office and supervisory employees, and employees in continuous process operations, and the above mentioned second shift operations, cannot work in excess of fifty-five hours in any one week.

In a later provision in the section it is provided that a watchman may be employed seven days in the week. Under this later proviso such watchmen cannot work in excess of ten hours per day or more than fifty-five hours per week, except that a watchman in case of emergency might work, under the first proviso above, for as much as sixty hours in one week.

SUBJECT: MAXIMUM HOUR LAW; SEASONAL RUSH OF BUSINESS

27 August, 1937.

Receipt is acknowledged of your letter of August 26th in which you describe an application of the Cary Lumber Company for permission to work its truck drivers in excess of the legal fifty-five hours per week and ten hours per day, on the grounds that they are engaged in a "seasonal rush of business." You state in your letter that the Cary Lumber Company operates throughout the year and runs its trucks every day the weather permits, and it has a bona fide "seasonal rush of business" during the spring and summer, when building is brisk.

The phrase "seasonal rush of business" must be considered in connection with the business to which it has application. It is not stated that the permission is to be granted only in a seasonal business, that is to say, one which is conducted only at different seasons during a year or at intermittent periods. The fact that this company operates the entire year would not prevent it from having a "seasonal rush of business." You state that it does have a "seasonal rush of business" during the spring and summer,

when building is brisk. I think, therefore, that you might be justified in finding that the application could be granted on this account. You will note the statute does not place any limit upon what is to be regarded as a "seasonal rush of business" or the length of time during which it may be considered to continue. I think, therefore, you are vested with authority in exercising your sound judgment in making this determination.

SUBJECT: MAXIMUM HOUR LAW; WOMEN PERMITTED TO WORK LONGER
THAN 6 HOURS WITHOUT REST PERIOD

19 April, 1938.

The question arises as to whether or not Section 13, Chapter 409, Public Laws of 1937, an Act which establishes maximum working hours for labor, has the effect of repealing that part of Consolidated Statutes 6554 (a) which provides that no female shall be employed or permitted to work for more than six hours continuously at any one time without an interval of at least one-half hour.

Section 13, which is a repealing Section of the 1937 Act, is as follows:

"All laws and clauses of laws inconsistent with the provisions of this Act are hereby repealed."

Nowhere in the 1937 Act is the subject matter of C. S. 6554 (a) mentioned. The latter statute is not inconsistent with the provisions of the 1937 Act, and is, therefore, not repealed by the enactment of the later statute.

SUBJECT: LABOR LAWS; MAXIMUM HOURS

20 April, 1938.

The proper interpretation of Section 3, Chapter 409, Public Laws of 1937, which, under the circumstances therein outlined, permits an employer to apply to the Commissioner of Labor for permission to allow such employees to work a greater number of hours than 55 per week for a definite length of time, not exceeding sixty days, would permit such employer, upon receipt of a permit from the Commission, to work his employees more than ten hours per day and more than 55 hours per week, if the seasonal rush of his business so requires, for a time not exceeding sixty days.

We are further of the opinion that if such extra hours are permitted, that the employer should be required to pay his employees one and one-half times the usual compensation for all hours worked over the 55 hours per week therein referred to, or all hours worked in excess of ten hours in any one day.

OPINIONS TO STATE HIGHWAY AND PUBLIC WORKS COMMISSION

SUBJECT: MAINTENANCE OF HIGHWAYS IN MUNICIPALITIES

21 July, 1936.

Very careful consideration has been given to your letter of July 17th and the construction placed by you upon Chapter 213, Public Laws 1935, together with the provisions of C. S. 3846 (j) and (g), and C. S. 3846 (ff).

I am convinced that the construction of these enactments made by you is correct and that, under the law, the State Highway and Public Works Commission is not required to spend upon the maintenance of highways in municipalities any amount in excess of the appropriation of \$500,000.00 provided for in Chapter 213, Public Laws 1935. I am also of the opinion expressed by you that in addition to said amount they would be authorized to make expenditures for maintenance made previous to the 1935 enactment under statutes existing then. It may be, however, with the background of the experience of the Commission there is found some support for the view that the Legislature intended that the appropriation made by the 1935 Act should be expended for the purposes of the 1935 Act in addition to amounts expended on maintenance of highways by the Commission in municipalities, still leaving it within the sound discretion of the Commission as to whether or not such combined expenditures were, in the opinion of the Commission, necessary and proper. This, I believe, coincides with the views expressed in your letter of July 17th.

SUBJECT: HIGHWAYS; RAILROAD GRADE CROSSING SIGNS

23 April, 1937.

I have your letter of April 17, making reference to Section 2 of Chapter 255 of the Public Laws of 1923, now carried as Section 2621 (c) in the Code, and to Section 6 of Chapter 148, Public Laws of 1927, and Section 1 of Chapter 222, Public Laws of 1925.

It is noted in your letter that you have construed the 1927 Act as being in substitution for the 1923 Act, so as to operate to repeal the former act with respect to the requirements as to railroad grade crossing signs referred to in the respective Sections of these acts.

I agree with the conclusion which you have reached. There is a very definite conflict between the provisions in the two acts. Under the 1923 Act, it was required that every railroad should place a signboard at all public road or grade crossings, such signboard reading as follows: "N. C. Law, Stop." The only limitation provided is that this enactment should not interfere with regulations prescribed by towns and cities.

Under the 1927 Act, Code Section 2621 (48), the road governing body is authorized to designate the grade crossings at which vehicles are required to stop and at which the railways are required to erect signs thereat, notifying drivers of vehicles upon any such highway to come to a complete stop before crossing railway tracks. When so designated, it is made unlawful for a driver of any vehicle to fail to stop. Other provisions are made as to the effect of the law in civil actions and specific provision is

made as to school trucks and other types of vehicles. The 1927 Act, in my opinion, supersedes the 1923 law, and by virtue of the repealing clause in the 1927 act, the 1923 Act is, in this respect, repealed.

SUBJECT: STATE TAX ON AGRICULTURAL LIME SOLD BY THE HIGHWAY
AND PUBLIC WORKS COMMISSION

22 June, 1937.

I have your letter of the 17th of June upon the above subject. As requested by you, I have reviewed the letter I wrote to the Agricultural Department but I am unable to come to any conclusion other than the one I expressed therein.

The letter was not written without due consideration, and if I have made a mistake it is, I fear, deliberate.

Of course, in answering an inquiry of this sort from one of the departments, I do not consider it necessary or, indeed, helpful to the department to state fully the considerations upon which my opinion is based. However, in view of your letter and the authorities cited by you, I think it is due you that I state to you briefly the reasons why your letter leaves me unconvinced.

I understand you to challenge the correctness of the application of the tax on the manufacture and sale of agricultural lime to that manufactured and sold by the State Highway and Public Works Commission, upon the ground that this Department was not specially mentioned in the law imposing the tax, and "general laws do not bind the sovereign unless expressly mentioned in them"; and in support of this position you cite *O'Berry v. Mecklenburg County*, 198 N. C., 357.

I think your position would have greater plausibility at the time *O'Berry v. Mecklenburg County* was decided, although I do not think that even then it was tenable.

The doctrine that general laws have no application to the sovereign (and for simplicity we may substitute for "sovereign" the State, its agencies and subdivisions) unless they are specially mentioned, does not, in my opinion, have any application where the activity in which the State or its agency or county is engaged is not governmental in character, but is a private enterprise or proprietorship. The manufacture, sale, and distribution of commercial agricultural lime is admittedly a non-governmental enterprise carried on in competition with private citizens who pay the tax.

The only significance I see in Section 20, Chapter 172, Public Laws 1933, is that the non-governmental enterprise of manufacturing and distributing commercial agricultural lime had to be authorized by statute or else could not have been lawfully carried on by the Department of Highways and Public Works. *Holmes v. Fayetteville*, 197 N. C., 740.

The principle I had in mind in citing *Town of Benson v. Johnston County*, 209 N. C., 751, is expressed in that case through the following approved quotation from *Atlantic and North Carolina Railroad v. Board of Commissioners of Carteret County*, 75 N. C., 474 (476), upon which principle the case was decided:

"But where the State steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do not prevail . . . At any rate, we do not think the exemp-

tion in the Constitution embraces the interest of the State in business enterprises, but applies to the property of the State held for State purposes."

Reverting to the doctrine laid down in *O'Berry v. Mecklenburg County*, to the effect that general laws do not affect the sovereign unless specially mentioned, while that is clearly enough stated in that case, its application is very clearly limited to those cases *where the agency is acting in a governmental capacity or engaged in a governmental activity*; in that case, the use of gasoline for a governmental purpose. Fortunately this distinction is maintained with sufficient clearness in the opinion of the court: See headnote 3; cp. citation from *Cooley*, page 361; 362. I think the opinion of the court in *Town of Benson v. Johnston County* went much further than is conceded in your letter. It dealt with the constitutional prohibition against taxation of property owned by State, county, and municipality, Article V, Section 5; but in it the court must have passed upon the contention you now make, because, outside of and beyond the constitutional question settled, that contention was as outstanding in that case as it was here, and a taxing statute quite as general as the one challenged was held to apply to the non-governmental activities and proprietorships of the county.

In the light of *Town of Benson v. Johnston County* and, indeed, without it, I think you would have to admit that if the county of Mecklenburg had engaged in the purchase and use of gas for a non-governmental proprietary purpose the result in *O'Berry v. Mecklenburg County* would have been far different. Certainly a doctrine never applied except to a sovereign acting in a sovereign capacity could not have been invoked.

The Department of Agriculture, like the Department of Highways and Public Works, is really supported by tax upon special subjects. One of the sources of support of the Department of Agriculture is the tax on the manufacture and sale of agricultural lime. It might be well to consider in interpreting the law whether or not the entry of the Department of Highways and Public Works to this field, although authorized by law, and the exhaustion of this source of revenue, does not constitute a species of siphoning.

It may be possible that the court might make some discrimination between an excise tax and a property tax, but if it does it will be, in this instance, utterly wanting in any worthy distinction, and will be a complete abandonment of the principle it has announced. It may be, also, that the court, if the matter should again come before it, might reverse its holding in the matter; but, at present, I do not see my way clear to alter the ruling which I have made.

SUBJECT: WORKMEN'S COMPENSATION LAW; CONTINUANCE OF
PAYMENTS; SPECIFIC INJURIES

4 April, 1938.

I have your letter of April 1st, in which you ask my opinion as to continuance of compensation payments to a State Highway Patrolman who has been awarded compensation for the loss of an eye. You are advised that the Patrolman has returned to his job and is now receiving his full, regular salary, and that compensation payments were awarded him for the loss of the eye for one hundred weeks, payment of which is being made in

addition to compensation already paid for temporary disability and medical costs.

In the case of *Smith v. Swift & Co.*, 212 N. C. 608, our Court held in a case in which compensation had been awarded under Section 30 of the Act (Michie's Code 8081 (11)) for partial permanent disability and the employe had returned to work, receiving his usual salary, that the earning of his usual salary was a change of condition under Section 46 of the Act and that he was not thereafter entitled to any further compensation. This decision was based upon the language of this section, which is quite different from the language employed in Section 31. The Court expressly refers to the fact that compensation is not awarded under Section 31, indicating there would be a difference with respect to cases arising under the latter section.

In Section 31 it is provided that in cases included within the Schedule, "the disability in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be specified therein * * * ." Subsection q provides for one hundred weeks for the loss of an eye.

I, therefore, agree with the conclusion which you have reached that the employe is entitled to the full amount of the compensation provided for for specific injuries listed in Section 31, independent of any question as to the earnings of employment of the employe thereafter, and I do not think that the decision in the case of *Smith v. Swift & Company*, *supra*, reaches any contrary conclusion.

OPINIONS TO THE STATE BOARD OF HEALTH

SUBJECT: HEALTH LAWS; RESTAURANTS; DEFINITION OF THE
TERM "RESTAURANT"

5 August, 1936.

Section 1, Chapter 186, Public Laws of 1921, as amended, defines the term "restaurant" to "include lunch counters, cafes, and all other establishments whatsoever where lunches, meals, or food in any form are prepared for and served to the public for immediate consumption." You inquire if the place where sandwiches are prepared and wrapped though not served to the public would come within the meaning of the above act.

We do not think so. It is our opinion that the law contemplates only such a place where food as defined in the act is actually served to the public for immediate consumption. That is to say, if sandwiches or other foods were prepared in the home and delivered to a lunch counter and not actually served where prepared, that such a place could not be termed a restaurant within the meaning of the statute.

The lunch counter in this particular instance would, of course, come within the meaning of the term "restaurant" as above defined, and would be subject to the provisions of the act above referred to.

SUBJECT: HEALTH DEPARTMENT; PRIVATE WATER SUPPLY IN
INCORPORATED TOWNS; CONTROL

23 January, 1937.

In my opinion, the question of permitting owners of property within an incorporated town to furnish water from a privately owned source, as for example an artesian well, to the properties so privately owned, and the tenants thereof, is one for control by the governing body of the town under its general authority to pass ordinances to promote the health and welfare of the town.

Of course, where this method of water supply becomes practically, not merely theoretically, a menace to the health of the town in any way, the Board of Health may act in the matter as it would in any similar case, regardless of an authority extended to the private owner to adopt this method of supplying water to his premises.

Without particularly citing pertinent provisions of the public health laws relating to these matters, I am of the opinion that the Board of Health would not be justified in interfering with an arrangement of that sort unless it could be shown that there was an actual present menace to the health of the town on account of the water so furnished.

SUBJECT: PUBLIC HEALTH; CONTROL OF PREVENTABLE DISEASES; REPORTS

20 February, 1937.

C. S. 7151 to 7154, inclusive, relate to the control of preventable diseases. Section 7151 provides for reports or notices to be given by every physician concerning the existence of certain types of diseases, and Section 7152 requires reports from householders and parents with reference to such di-

seases. Amongst the diseases catalogued as to which reports shall be made are:

“Infantile paralysis;
Typhoid fever;
Asiatic cholera;
Bubonic plague;
Yellow fever.”

This catalogue is repeated in Section 7153, requiring quarantine officers to report such cases to the State Board of Health. In none of these sections is malaria directly mentioned, but this disease is undoubtedly covered by the expression used in all these sections: “other diseases declared by the North Carolina State Board of Health to be preventable.”

Unquestionably malaria is a preventable disease, and I understand that the history of the fight against malarial diseases discloses the fact that it is perhaps the most preventable of all diseases included in the category mentioned. It is true that the prevention of this disease must be had very largely through breaking up the breeding places of the *Anopheles* mosquito, the bite of which has been ascertained to cause the disease. In my opinion, the sections referred to require the notices and reports to be given of malaria just as it does the other diseases mentioned by name.

Now with regard to the provisions of Section 7154 and other laws relating to the actual control and prevention of these diseases. It is well known at this time that the disease of malaria may be almost entirely wiped out and prevented by control of the places where these mosquitoes are bred. This method of prevention is just as much open to the State Board of Health and its officers and agents as any other; and I am of the opinion that the State Board of Health has as much authority to make rules and regulations for the prevention of this disease by control of the breeding places of the mosquito as it has to control, prevent, or deal with any other of the diseases mentioned, in the manner appropriate for the purpose.

Therefore, in my opinion, it is competent for the State Board of Health to pass rules and regulations relating to the control or removal or proper treatment of places where these mosquitoes are bred, when the interest of the public health generally or the community in particular may require, under authority of Section 7154 and other pertinent statutes.

SUBJECT: MUNICIPAL CORPORATIONS; PRIVIES; REGULATIONS

23 April, 1937.

The question has arisen as to whether a town ordinance requiring that no privy be erected within fifty feet of any cafe or restaurant, and excepting water closets from the provisions of the ordinance, would be valid and enforceable in the situation where an inspector of the State Health Department had given directions that a pit privy should be erected within fifty feet of a cafe.

It is the opinion of this department that the town ordinance is a valid exercise of the city's police power, and that it should take precedence over the instructions of the Sanitary Inspector. The statutes authorizing the State Health Department to make regulations as to privies do not authorize that department to say when and under what conditions privies shall be built, but only to make rules relating to the sanitation of the privies after they are constructed. The powers of municipal corporations,

as defined in C. S. 2787, clearly are broad enough to sustain the ordinance in question passed by Kenansville, and hence in my opinion Mr. Strickland will be unable to erect the privy within fifty feet of the cafe.

SUBJECT: MILK ORDINANCES; VALIDITY

29 May, 1937.

You inquire in your letter of May 27, whether or not the North Carolina Edition of the Public Health Service Milk Ordinance is constitutional in so far as it increases the standards set up in the federal model. The authority of counties and municipalities to enact milk ordinances is found in Consolidated Statutes 2795 and 7065. There is nothing in the statutes to limit counties or municipalities to the terms and conditions prescribed in the federal model. The limitation upon their power to enact such ordinance is governed solely by the test of reasonableness.

The United States Public Health Service has recognized the right to impose more rigid requirements than those suggested in its model, as one Section of that model provides that it is to be considered as a minimum in its requirements.

Some contention may be raised as to the authority of counties or municipalities to enact milk ordinances in view of Consolidated Statutes 7251 (w-4), which authorized the Board of Agriculture to supervise the sale of dairy products. There is no real conflict of authority here, however, since this Section excepts from its provisions the right to make inspections as to public health and sanitation.

SUBJECT: WINE ACT; LICENSE TO GRADE A HOTELS, CAFETERIAS, CAFES, AND RESTAURANTS; DEFINITIONS OF DUTIES OF STATE BOARD OF HEALTH WITH REFERENCE THERETO

15 June, 1937.

Under the North Carolina laws, the Revenue Act of 1937, Section 509½, licenses the sale of wines and alcoholic beverages defined in Sections 501 (b) and (c) by "own premise license" by "bona fide hotels, cafeterias, cafes, and restaurants" "which at the time of the application for such license have been given a Grade A rating by the State Board of Health."

Inasmuch as it is the duty of the State Board of Health to inspect such places and to give them the rating to which they are entitled, you have inquired of me as to what places may be included in the above definitions and as to how the Revenue Department may be informed as to the rating of such hotels, cafeterias, cafes, and restaurants at the time of application for license.

As to the first question, I think that the terms "hotels," "cafeterias," "cafes," and "restaurants" must be taken in their ordinary significance, and the term "bona fide" used as descriptive of such places means that they must be real hotels, cafeterias, cafes, and restaurants, and not mere shams or evasions set up or conducted for the purpose of qualifying to receive license to sell alcoholic beverages.

It may be that in the actual application of the law some difficulty may be experienced in determining whether a given place falls within any of these classifications; I can only give a general rule; but, ordinarily, it should be

obvious as to whether or not the place itself, and the manner in which it is conducted, and the extent of the operations or features characterizing the place as a cafeteria, cafe, or restaurant are present.

I do not think that it is the intention of the law that such cafeterias, cafes, and restaurants should be conducted in places solely devoted to such activity in order to qualify under the law. A restaurant may be conducted under the same roof or in the same room with some other business enterprise and still be a restaurant. That combination is very often found in department stores, drug stores, service stations, and like places, but in every instance the restaurant feature must be so pronounced as to be obviously a bona fide restaurant (or cafeteria, cafe, or hotel). The intention of the law may be further understood by reading the last part of Section 509½ 1. "Where prepared food is customarily sold and to such only as are licensed under the provisions of Section 127 of the Revenue Act of one thousand nine hundred and thirty-seven." A reference to the section of the Revenue Act cited shows that it is the section imposing a tax upon restaurants, cafeterias, cafes, and hotels, and on drug stores and other places where prepared food is sold.

As to your second inquiry, obviously licenses cannot be given to any of these eating places which at the time of the application for license have not an A rating. In my opinion, therefore, it would be required of an applicant for license under this law to satisfy the licensing authority with proper evidence of such rating; and this could be best done by a certificate from the State Board of Health, showing a Grade A. rating.

In my opinion also, if any one of the places mentioned in the statute should cease to have a Grade A. rating, upon examination by the State Board of Health, the license granted would be subject to revocation.

In my opinion, while the law does not make any positive requirement at this time, it would be the duty of the State Board of Health to notify the licensing authorities of the fact when any licensed hotel, cafeteria, cafe, or restaurant has ceased to have a Grade A. rating.

SUBJECT: DEPARTMENT OF HEALTH; SEWAGE TREATMENT; C. S. 7125

9 July, 1937.

I do not consider that the duties and authority of the State Board of Health, with regard to approval of sewerage systems, is affected by the provisions of C. S. 7125, which prohibits the discharge of raw sewage into "any drain, brook, creek, or river; from which a public drinking water supply is taken."

Construing C. S. 7125, the Supreme Court in *Town of Smithfield v. City of Raleigh*, 207 N. C., 597, upon the facts of the case there set out that the power of the Court of Equity was not taken away by the positive restrictive language of that statute, but that the Court would look further and see whether or not actual injury was done to the complainant before exercising its power to restrain the discharge of the sewage.

In my judgment, notwithstanding Section 7125, under the authority given to the State Board of Health under sub-chapter 3, Article 7 of the Consolidated Statutes 7116 and following, the State Board of Health has the power to pass upon the question of the pollution of water above the intake of any water supply used by a town or city and to require an adequate

system of sewage treatment, notwithstanding the fact that the Court, as stated in the case above cited, will take the facts of the case under consideration upon the application for an injunction against the discharge of raw sewage into the stream.

As to any action on the part of a County Board of Health in the matter, that will be governed by C. S. 7064 and following; especially note C. S. 7065 and 7071. In my opinion, the County Board of Health would have no jurisdiction in the matter until the situation became such as to be a menace to the public health or a nuisance.

SUBJECT: COMPENSATION; MEMBERS COUNTY BOARDS OF HEALTH

30 July, 1937.

Receipt is acknowledged of your letter of July 26th in which you inquire as to what compensation is payable to members of the County Boards of Health, and also inquiring as to whether or not the County Superintendent of Schools as a member of the County Board of Health, is entitled to compensation for attending meetings of the Board. An examination of Article 3, Chapter 118 C. S., discloses that there is no express provision made in the law for compensation to be paid to the members of the County Board of Health. In C. S. 7065, prescribing the duties of the County Board of Health, it is provided as follows: "They shall make such rules and regulations, pay such fees and salaries, and impose such penalties, as in their judgment may be necessary to protect and advance public health." In my opinion, this has no reference to the compensation of the members of the County Board of Health, but to such authorized expenditures as they may make, including employment of a County Health Officer as provided in this section. Approval must be had by the Board of County Commissioners before being paid.

In the case of *Borden v. Goldsboro*, 173 N. C., it is said: "A public officer is not entitled to payment for duties imposed upon him by statute in the absence of an express provision for such payment." In the absence of any direct provision of payment of compensation to members of the County Boards of Health, in my opinion, there is no authority given for payment of compensation to them for attending meetings of the Board. This would, of course, apply to the County Superintendent of Schools as well as any other member of the Board.

SUBJECT: APPOINTMENT OF LOCAL REGISTRAR; TERM OF OFFICE

21 December, 1937.

I have your letter of December 20th advising that a local registrar was appointed by the Mayor of Greenville under the provisions of 7089, and that in the appointment the appointing officer struck through the language in the appointment blank providing for a four year term, and substituted therefor one year. It is also noted that this appointment was accepted and the matter was not called to your attention until the question arose as to the limitation upon this term of office under this appointment.

C. S. 7089 provides for an appointment by the Mayor of the local registrar, and says: "The term of office of each local registrar so appointed shall be four years, beginning the first day of January of the year in which the local registrar is appointed * * *."

Under this provision the term of office for the local registrar is fixed by law for a period of four years. It is my opinion that the appointing officer would have no right or power to reduce or change the term of office as thus prescribed by the statute. Where the appointing power is given the right to fill an office for a definite statutory or constitutional term and the appointing power attempts to limit the term to less time, the limitation will be disregarded as surplusage, and the appointee's acceptance under such an appointment would not, in my opinion, estop him from claiming the entire term. See 46 Corpus Juris 965, citing *Clark v. State*, 177 Ala. 188, 59 S. 259. It is, therefore, my opinion that under this appointment, the attempted limitation of the term of office to one year would not be regarded and that the appointee would hold for the entire term of four years as fixed by the statute.

SUBJECT: STATE LABORATORY OF HYGIENE BONDS; EXEMPTION
FROM INHERITANCE TAX

22 December, 1937.

I have your letter of December 22nd, in which you inquire as to whether or not bonds issued under Chapter 324, Public Laws of 1937, would be exempt from inheritance tax if these bonds constituted a part of a taxable estate in North Carolina.

There is no provision in the Act which exempts these bonds from inheritance taxation; and there is no provision in the Inheritance Tax Law which would exempt them from taxation, unless the bonds passed by inheritance or by will to the classes of persons and corporations named in Section 2 of the Revenue Act of 1937. This section exempts property passing to state and municipal governments, religious, charitable, or educational corporations, etc., as defined in the subsections to this section.

SUBJECT: DEAD BODIES; REMOVAL; PERMISSION OF STATE BOARD OF HEALTH

2 April, 1938.

After having discussed the matter which you presented to me with Mr. Seawell, he suggests that the following paragraph be incorporated into the petition giving permission for the disinterment, removal, and reinterment of deceased persons from certain areas in Cherokee County.

"Provided that this permission shall in nowise be construed as relieving the Tennessee Valley Authority from the necessity of complying with all laws and statutes in North Carolina regulating the disinterment, removal, and reinterment of dead bodies."

As you stated yesterday, the purpose of giving the permission of the State Board of Health is not to relieve the Tennessee Valley Authority from the duty of complying with the statute, but solely to give to it the permission of the Board. We suggest the above proviso be actually incorporated into the blanket authority, however, so as to remove all doubt concerning the permission which the State Board is undertaking to give.

SUBJECT: MUNICIPAL CORPORATIONS; EXTENSION OF INCORPORATED LIMITS;
POWER OF A MUNICIPALITY

17 June, 1938.

In our telephone conversation on yesterday, you stated that the City of Gastonia desires to provide a municipal sewerage service to an area outside the incorporated limits of the city. It is expected that this territory will be brought within the incorporated limits of the City during the next Session of the Legislature, but it is thought wise to establish a sewerage system prior to this time.

We do not know of any manner in which this may be legally done. As you know, a municipal corporation's powers are limited to those powers specifically conferred upon it by the Legislature. While statutes have been enacted under which a municipal corporation may extend its sewerage system beyond the city limits in order to obtain proper outlets and may lay water mains for fire protection purposes within a two mile limit of its boundaries, there is no provision under which a municipality may extend its sewerage system for the benefit of those persons living outside of its territory. Exactly the same principle is involved in regard to the extension of the limits of a municipality for the purpose of including the territory sought to be serviced. Here again, the power of the municipality is confined to that which is given it by the Legislature. We know of no provision in the law under which a municipality may by petition or otherwise, extend its boundaries in the absence of legislation.

OPINIONS TO LOCAL GOVERNMENT COMMISSION

SUBJECT: ARMORIES; BONDS FOR CONSTRUCTION BY COUNTY OR MUNICIPALITY; NECESSARY EXPENSE; CONSTITUTION ARTICLE VII, SECTION 7

15 September, 1936.

I do not consider the expense of the construction of an armory a necessary expense for a county, city, town, or other municipal corporation, within the meaning of the Constitution of North Carolina, Article VII, Section 7, prohibiting the contraction of debt or the loan of credit of such county or municipality without a vote of the majority of the qualified voters.

It is true that under the Municipal Corporation Act of 1917 (C. S. 2832) a city has the right to "acquire, establish, etc.," armories. In my opinion, however, this does not consider the acquisition or construction of an armory a necessary expense.

SUBJECT: INTEREST ON PAST DUE BOND COUPONS

9 February, 1937.

I have your letter of February 6, in which you inquire as to the liability of a municipality for interest on defaulted bonds which were not presented for payment at their maturity in cases in which funds for payment of the bonds are not on hand with the paying agent at the time the bonds mature.

In the case of McLendon vs. Commissioners, 71 N. C., 38, it was held that the county was liable for interest on coupons from the date of maturity of the coupons. In this case, the county did not have funds available for the payment of the coupons at the paying agency at the time of maturity of the coupons. No demand had been made upon the commissioners for payment of the coupons. The court held that, nevertheless, the county was liable for interest on the coupons from the date of maturity.

If the facts disclose that the county had funds available with the paying agency for the paying of coupons or interest of the bond at maturity, this would be equivalent to a tender or payment under the provisions of C. S. 3051 and thereafter the holder could not collect interest.

SUBJECT: MUNICIPALITIES; SALE OF MUNICIPAL PROPERTY

16 February, 1937.

Section 2688 of the North Carolina Code, as to form, apparently, is an enabling statute permitting the Mayor and Commissioners of any town to sell real or personal property belonging to the town at public auction. In reality, and as construed by the courts, it must be considered as restricting the manner in which the property of the town subject to the right of sale may be sold.

In Southport vs. Stanley, 125 N. C., 464; 34 S. E., 641, the Supreme Court in construing this Section held that it did not confer upon a town the right to sell or lease real estate to be held in trust for the use of the town, or real estate which is devoted to the purpose of Government. See also Brockenbrough vs. The Board, 134 N. C., 122; 46 S. E., 28.

It seems, therefore, that the town may be permitted to sell only such

property as is not held in trust for a special purpose and is not devoted to governmental purposes.

Under the decision of the court in the case of *Benson vs. the Commissioners of Johnston County*, 209 N. C., 751, real estate which has been purchased by the town upon a foreclosure suit for taxes is not considered held for governmental purposes. In my opinion, real estate purchased by the town in the foreclosure of a mortgage securing investment of sinking funds would be held by the court to be on a parity with real estate purchased at a tax foreclosure sale and would not be considered held for a governmental purpose. This, however, would only bear upon the power of the town to sell it at all and not upon the manner of sale.

C. S. 2688 was no doubt enacted in order to prevent fraud or graft in the sale of town property. It is a remedial statute and inasmuch as the evil which it is probably intended to prevent will be common to all sales of town property, in my judgment, the manner of sale provided for in the statute completely controls and is applicable to the sale of the real estate mentioned in your letter. In other words, it must be sold at public outcry in accordance with the statute.

SUBJECT: CONSTITUTIONAL DEBT LIMITATION PROVISION

4 June, 1937.

Receipt is acknowledged of your letter of June 2. You submit for consideration the question arising under the constitutional amendment effective on November 26, 1936, as submitted under Chapter 248, Public Laws of 1935. The question is submitted by you in the following form:

"Prior to the time the provisions of Section 4 of Article V of the Constitution limiting debt which may be contracted by counties and municipalities became effective (November 26, 1936) and subsequent to June 30, 1936, a county or municipality issued bonds for public improvements in excess of two-thirds of the amount by which the debt was reduced in the fiscal year ending June 30, 1936. May such county or municipality issue additional bonds before the close of the fiscal year ending June 30, 1937 for public improvements without submitting the question to the voters in accordance with the Constitution and without taking into consideration the bonds issued prior to adoption of the amendment to the Constitution? Would the fact that issuance of the bonds subsequent to June 30, 1936 and prior to the adoption of the amendment was approved by the voters have any bearing on the question?

The language of the amendment so far as here pertinent is as follows:

" * * * the General Assembly shall have no power to authorize counties or municipalities to contract debts, and counties and municipalities shall not contract debts, during any fiscal year to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of that particular county or municipality shall have been reduced during the next preceding fiscal year, unless the subject be submitted to a vote of the people of the particular county or municipality."

During the fiscal year beginning July 1, 1936, and which will end on June 30, 1937, the county or municipality is by this provision prevented from contracting any debts in excess of two-thirds of the amount of its retirements in the next preceding fiscal year without a vote of the people. This

provision clearly includes and was intended to include all debts contracted by the county or municipality during the fiscal year, whether such debts are contracted before or after the effective date of the constitutional amendment. The amendment, in my opinion, clearly so provides.

SUBJECT: CONSTITUTION; DEBT LIMITATION; CASUAL DEFICIT

16 July, 1937.

In my opinion, when a deficit has been caused in the current expenses of a municipality by deliberately expending the funds of the town for a specific purpose not authorized by law, this would not be considered a casual deficit within the meaning of Article V, Section 4, of the Constitution, permitting a municipality to fund a casual deficit without submission to a vote of the people.

SUBJECT: AUDIT OF COUNTY ALCOHOLIC BOARDS OF CONTROL

4 August, 1937.

I have your letter of July 29th, in which you inquire in view of the provisions of Section 4 (b) of Chapter 49, Public Laws of 1937, whether or not full authority for audit of liquor stores has been transferred to the State Board of Alcoholic Control. Your letter also indicates that you desire my opinion as to whether or not any contracts made for auditing County ABC Stores should be submitted to and approved by the Local Government Commission. I understand that you have been approving contracts made with Public Accountants with respect to audits of Alcoholic Beverage control activities under the Pasquotank Liquor Control Act.

Under Section 4 (b) above referred to, the State Board of Alcoholic Beverage Control is authorized to audit and examine the accounts and records, books and papers relating to the operation of county stores, or to have the same audited. Notwithstanding this provision, I am of the opinion that the counties themselves may cause to be audited the affairs of the stores set up in their respective counties under the provisions of the Pasquotank Act or the 1937 Act. If contracts are to be made by the counties or by any city, looking toward the audit of such stores in such counties or cities, it is my opinion that these contracts should be submitted to and approved by you under the provisions of Chapter 201, Acts of 1929, as amended by Chapter 99, Acts of 1931.

SUBJECT: ELIGIBILITY OF HOUSING MORTGAGE DEBENTURES AS SECURITY FOR DEPOSITS UNDER LOCAL GOVERNMENT ACT

29 September, 1937.

Examining Title II of the Federal Housing Act, Section 1710 (b), I find that "debentures issued in exchange for mortgages, insured under this section prior to July 1, 1937, shall be fully guaranteed as to principal and interest by the United States." As to other indentures, they "shall be a liability of the fund only."

This expresses the limit of the insurance authorized under this title and referred to in subsection (a) of the Act.

It is my opinion that only those mortgages insured prior to July 1, 1937, are fully guaranteed as to principal and interest by the United States, and these only are eligible as security for deposits.

SUBJECT: DEBT REDUCTION; CANCELLATION OF SINKING FUND BONDS

13 May, 1938.

I have your letter of May 12. You refer to a case in which you state a county has used sinking funds in the purchase of particular bonds for which the sinking funds were created to pay. These bonds have been acquired over a period of three or four years, but have not been cancelled and have been kept alive as sinking fund investments of the county.

The question now propounded is whether or not, if these bonds are cancelled by the Board of County Commissioners on or before June 30, 1938, the close of the current fiscal year, they may be considered as debt reductions within the current year within the meaning of the constitutional debt limitation provision, Article V, Section 4, of the State Constitution.

It is my opinion that only those bonds which have been purchased from these sinking funds within the current year may be considered as debt reduction within the constitutional provision. Bonds which were purchased in prior years, although not actually cancelled and retired, would not be properly considered as debt reduction within the current year.

You call my attention to Chapter 413, Public Laws of 1931. In consideration of the provisions of this Act, I have reached the above conclusion independent of other reasoning which might lead to the same result. Section 1 of this Act provides that the County Commissioners and others having sinking funds in charge are "authorized and directed" to apply sinking funds on hand to the purchase and retirement of specific bonds for which the sinking fund was created. The provisions of this statute are direct and mandatory. It not only authorizes, but directs that the sinking funds be so employed and requires that the bonds be purchased and "retired."

In dealing with the question, the Courts would treat as done that which the law required to be done. Although the bonds were not actually retired or cancelled as required by this Act, the effect of the law would be to treat them as though they were cancelled and completely retired at the time they were purchased by the sinking fund.

OPINIONS TO STATE BOARD OF ELECTIONS

SUBJECT: ELECTIONS LAW; PRESIDENTIAL ELECTORS

26 September, 1936.

I have on my table copy of telegram sent from National Headquarters to Hon. J. Wallace Winborne, Chairman of the State Democratic Executive Committee, calling attention to the fact that Article II, Section 1 of the Constitution, prohibits those holding offices of trust or profit under the United States from being presidential electors.

Upon this you ask the advice of this office.

Some four or five of those selected as candidates for presidential elector hold offices or places of trust under the laws of the State of North Carolina, but these are not in any way involved in the prohibition of the Federal Constitution.

While the State Constitution prohibits double office holding, and I assume for the purpose of stating my position that a presidential elector is an officer under our Constitution (which I really doubt), this could have no possible bearing on the Constitution, for the reason that when an elector takes the oath of office automatically any other office that he might hold under the said law is eo instante vacated.

The letter of Hon D. E. Henderson has been laid before me and I regret to say that, in my judgment, holding the position of Conciliation Commissioner, under Section 75 of the National Bankruptcy Act, and Referee in Bankruptcy would, apparently, disqualify Mr. Henderson for the position of elector under the article of the Federal Constitution referred to.

SUBJECT: ELECTION LAW; NOTICE OF CANDIDACY; FAILURE TO RECEIVE
FILING FEE

26 March, 1938.

Upon your inquiry as to filing candidacy of Rev. A. A. Johnson, of Buncombe County, I beg leave to say:

My understanding is that Mr. Johnson registered a letter which he claims contained \$100.00 in two bills of \$50.00 denomination each to pay his filing fee as a candidate for the United States Senate in the forthcoming primary.

Upon the opening of the letter in your office it did not contain any money, but the envelope itself did show that it had probably been opened at some time and pasted back together.

At any rate, the money did not come into the possession of the State Board of Elections, as required by law in order to make legal the filing of candidacy C. S. 6022.

I understand further that Mr. Johnson was notified in apt time that the money was not received.

You now inquire whether he is entitled to file as candidate under the above showing or after the time of filing has expired under the statute without further deposit of the fee.

The language of the statute is explicit and admits of no doubt in its interpretation. Under C. S. 6023 a candidate for the United States Senate must deposit with the Board of Elections at the time of filing his declaration of

candidacy a fee of one per cent of the annual salary of such office. Since the declaration of candidacy and pledge must be in the possession of the State Board of Elections before the dead-line, this fixes the time at which the fee can be received as of no later time.

SUBJECT: REGISTER OF DEEDS; APPOINTMENT—TERM OF OFFICE

27 April, 1938.

I am advised that Mr. S. E. Allen and Mr. L. O. Robertson have filed notice with the Board of Elections of Warren County as candidates for the office of Register of Deeds on the Democratic Ticket, the filing by Mr. Allen being by protest based upon the contention that his present term by appointment continues until four years from the last General Election. My advice is desired, as I understand, as to whether or not the County Board of Elections should place the names of Mr. Allen and Mr. Robertson on the ballot for the June Primary.

It is my information that Mr. S. E. Allen was appointed as Register of Deeds by the Board of Commissioners of Warren County on September 22, 1937, to fill the vacancy caused by the resignation of Mr. J. C. Powell. My attention has been called to Chapter 362, Public Laws of 1935, increasing the term of office of the Register of Deeds in Warren County to four years, and also to C. S. 3546, which provides that a vacancy from any cause in the office of the Register of Deeds shall be filled by the Board of County Commissioners by the appointment of a successor for the unexpired term.

You inquire as to whether or not the appointment of Mr. Allen would hold until the next election provided for by Chapter 362, Public Laws of 1935, or whether he would be required to stand for election at the next general election to be held this year.

It is my opinion that the appointment under the provision of C. S. 3546 was for the unexpired term, the term expiring the first Monday in December, 1940. In any case, as in *Rodwell v. Rowland*, 137 N. C. 617, involving the appointment of a Clerk of the Superior Court, in which doubt exists as to the term for which the appointment is made, the doubt is resolved in favor of requiring an election at the next General Election following the appointment. As to the Register of Deeds, however, the statute expressly provides that the appointment shall be made for the unexpired term. In the appointment of the Clerk of the Superior Court involved in *Rodwell v. Rowland*, the statutory provision was for the appointment to fill the vacancy until an election can be regularly held. The difference between that provision and the one involving the appointment of a Register of Deeds, I think is very important and leads me to conclude that the language of the statute is to be given its literal meaning.

Under the Constitution, Article VII, Section 1, provision is made for the election of, among other officers, a Register of Deeds. Section 14 of this Article gives the General Assembly full power to modify, change or abrogate any or all of the provisions of the Article and substitute others in their place, except Sections 7, 9 and 13.

As to the office of the Register of Deeds, therefore, it is clear that the Act of the Legislature with respect to this office is not subject to any constitutional inhibition, but the General Assembly is given full power to determine the term of office of the Register of Deeds, or even to abolish the office if it

so desired. The question, therefore, would seem to turn entirely upon the Act of the Legislature, which, as we have above noted, says an appointment to fill the vacancy shall be for the unexpired term.

It is, therefore, my opinion that the County Board of Elections should refuse to place the name of either candidate upon the ballot for the June Primary.

SUBJECT: ELECTION LAW; FORM OF BALLOT

11 May, 1938.

I have your letter of May 7th, directing my attention to section 139 (a-21), the Australian Ballot Law quoted in your letter. You state that a question has been raised as to whether the official ballots shall contain a blank space under the printed name of each candidate, with the enclosure for a check mark, affording an elector the opportunity of voting for some person other than one whose name appears upon the official ballot.

It is my opinion that the section referred to and quoted by you does require that this be done. The section provides that a voter shall prepare his ballot, marking in the appropriate margin or place a cross (X) mark opposite the name of the candidate or party of his choice for each office to be filled, *or by filling in the name of the candidate of his choice in the blank space provided therefor and marking a cross (X) opposite thereto.*

The underscored portion of the section clearly indicates to me that the law contemplated that the official ballots prepared for distribution should make provision for the writing in of the name of the candidate of the voter's choice, which, in my opinion, should be under the printed name of each candidate for each separate office voted on in the election. This does not, of course, refer to primary elections.

Section 127 (a-9), prescribing the form of the ballot and what the ballot shall contain, does not make any provision contrary to the opinion here expressed.

SUBJECT: PRIMARY ELECTIONS; RECOUNT; SECOND PRIMARY

21 June, 1938.

I have received your letter of June 20 referring to the Democratic nomination for Members of the House of the General Assembly in Johnston County. I understand from your letter that the County Board of Elections, after filing its original certificate showing that Mr. Wallace and Mr. Fulghum received a majority of the votes in the primary, has filed with you another certificate showing that only Mr. Wallace received a majority. From this second certificate it appears that Mr. Fulghum received 4295 votes; Mr. Coats was the next high man with 4097. The question submitted is whether or not under the circumstances outlined in your letter, Mr. Coats is entitled to a second primary.

In the re-count made by the County Board of Elections under order of the State Board of Elections, the County Board was required to make a re-count for Members of the House as well as for the State Senate, as to which the contest originally existed. The re-count of other offices, however, you state was for the information of the State Board and for comparative purposes. However, this re-count was ordered by the State Board and made by the County Board of Elections.

Since the re-count was made, the County Board has officially certified and declared the result, which leaves Mr. Wallace with a majority sufficient to entitle him to the nomination, and Mr. Fulghum with less than a majority of the votes. Under the authority given by statute to the County Board and the State Board, it is my opinion that the State Board had the right to order a re-count in the county and that it was proper for the County Board to proceed to make it. Having re-counted the votes, with the changed result, and having certified to this effect to the State Board of Elections and otherwise as required by law, it is my opinion that the certification as to the re-count constitutes the final and official action of the County Board. In effect, the second certification was the withdrawal of the original one made by the County Board and amounts to the official declaration by the County Board as to the result of the primary as required by C. S. 6045. Therefore, Mr. Coats having the next highest vote to Mr. Fulghum, in my opinion would be entitled to demand a second primary within five days of the time that the County Board declared the result of the re-count.

OPINIONS TO STATE BOARD OF CHARITIES AND PUBLIC WELFARE

SUBJECT: PAUPER SETTLEMENT; C. S. 1342

10 September, 1936.

It has been held by this Department that C. S. 1342, fixing the settlement of paupers, relates to settlement as between the counties of the State and has no bearing upon questions of interstate jurisdiction, residence, or settlement. See *Commissioners vs. Commissioners*, 101 N. C., 520.

Besides, I am of the opinion that, under the circumstances set out in your letter, the settlement of Lillian Royster is not controlled by the domicile of her husband, inasmuch as the parties had been separated for a period of eight years before the insanity of the wife, during which period the husband had no settlement in this State.

SUBJECT: ADOPTION OF MINORS; ACTUAL RESIDENCE OF CHILD; COMPLIANCE WITH CHAPTER 226 PUBLIC LAWS 1931 AND CHAPTER 243 PUBLIC LAWS 1935; EXTENT TO WHICH NON-COMPLIANCE MAY INVALIDATE ADOPTION

30 September, 1936.

In answering the inquiries as I do, I wish to call your attention to the fact that the adoption laws heretofore prevailing in this State are amongst the oldest regulating any procedures or any rights of individuals. The purpose of those laws was not so much to advance the welfare of society generally as they were to advance the welfare of the particular persons concerned in the adoption, and more particularly, at an early point in life, to secure for the child selected for adoption the security and safety of a home and that care and instruction which might come from those into whose home it had been adopted, and to give to the adoptive parents an interest in such child which, as far as might be possible, would be the equivalent of that which they might have in a natural child.

Undoubtedly, great advances have been made in recognizing the rights of society in such matters and protecting society as well as the adoptive parents and the adopted child from conditions which might be harmful.

From this angle the Welfare Department and its officers have been brought into the picture; and certain recognition has been given to the activities of the Welfare Department and certain duties have been required of them with regard to the adoption of children. I think it is regrettable that the duties of the Welfare Department and the functions of an adopting court have been dealt with in the same act in such a way as to make interpretations somewhat confusing.

However, I must say that in my opinion there are a great many things required in the chapters above referred to on the part of parents, persons bringing children into the State for placement or adoption, and the Welfare Department itself, the violation of which cannot be held to invalidate an adoption if the prime essentials of the act have been carried out. In this connection, therefore, and applicable to particular cases out of which this inquiry has developed, namely, the pending adoption of a minor before Mr. B. D. McCubbins, Clerk of the Superior Court of Rowan County. I must say

that I do not think that such minor neglects of the provisions of these chapters as may be apparent in the proceeding are sufficient to render that adoption invalid.

I must regard the statute, which requires, as a prerequisite to adoption, the actual residence of the child in this State for a period of one year, as referring to the condition of actually being physically within the State for that period of time and not to any constructive residence such as might be referred to a parent. I think further that a violation of the penal provisions of the law through bringing a child into this State for placement or adoption would not render the adoption itself, when finally made, invalid.

SUBJECT: GUARDIANSHIP; ADOPTION; DISTINCTION

19 October, 1936.

Guardianship and adoption are quite different things. When a child is adopted, it becomes the child of the adoptive parents and entitled to the same care, protection, and treatment from those parents as would be accorded a natural child, and the adoptive parents have the same control of such a child as they do of a natural child, until the adopted child becomes twenty-one years old. Questions of succession to estate are settled by the terms of the adoption.

There are two sorts of guardianship which involve (a) custody of the estate of the minor, and (b) custody of the person of the minor. One guardianship may include both. Such guardianship may be created by will or other instrument, or, as is usually the case, a minor child having no natural guardian, as for example, parents or some person standing in loco parentis, may have a guardian appointed by a proceeding in court for that purpose. Such a guardian has the custody of the estate or of the person, or both, in accordance with the terms of the order appointing the guardian, until the child becomes twenty-one years of age.

SUBJECT: ADOPTION PROCEEDINGS

19 March, 1937.

I have your letter of March 16, inquiring whether it is possible for a married couple to adopt a twenty-two year old person and a twenty-one year old person whom they have had in their home for about fifteen years, but for whom they have never wished to institute adoption proceedings. It is noted that the reason given for their desire is in order that these persons may legally bear the name of the foster parents. There is no provision in our statute which expressly provides for the adoption of adult persons. In each instance reference is made to "child" and the whole purport of Chapter 2 of the Code is with reference to the adoption of children. I do not find any decisions in our courts which have decided this question. Under *C. S. (Michie) 191 (6)*, the relationship of parents and child in granting letters of adoption is authorized and such relationship will continue during the minority of the child or for the life of the child according to the prayer of the petition.

It was held in the case of *Edwards vs. Yearby*, 168 N. C., 663, and *Grimes vs. Grimes*, 207 N. C., 778, that the adoption law being derogation of common law is strictly construed and will not be enlarged to confer any rights not clearly given.

I am unable to advise you with any certainty as to what the courts would hold if the case was presented involving the adoption of a person over twenty years of age. It is stated in C. J. Vol. I, page 1376, as follows:

"Minors or adults. With respect to the age of the child some statutes expressly authorize the adoption of 'any minor,' and the use of such language of course forbids the adoption of adults. In other statutes only the word 'child' is used; and in some jurisdictions these have been construed to authorize the adoption of minors only, but in most states having such statutes they have been construed to permit the adoption of adults."

Our Act uses the word "child," but the connections in which it is used in the statute indicates to me it was intended to include only a minor. In view of the conflict in decisions in other jurisdictions, I cannot anticipate with any degree of certainty what our court may decide if the question is presented. You inquire as to whether or not there is any statute whereby an adult may legally take the name of foster parents other than by adoption proceedings. C. S. Chapter 57, Sections 2970 to 2975, inclusive, make provisions for the change of name upon petition filed with the Clerk of the Superior Court in the county in which such person lives. Only one change in the name can be made. By consulting this statute, you will find the complete procedure therefor.

SUBJECT: ALIEN; ADMISSION TO STATE HOSPITAL

26 April, 1937.

In my opinion, C. S. 6187, forbidding Clerks of the Superior Court to commit to a hospital "any person who is not a bona fide citizen and resident of this State," is broader in its terms than C. S. 6184, which provides for the admission into the State Hospital of "any resident of North Carolina."

The use of the word "citizen" in addition to the word "resident" in this connection, I think, supports the view that there must be something more than residence and that the person entitled to admission to a hospital should be a person who has acquired the ordinary civil rights of citizenship.

Outstanding amongst those rights is the right to vote and hold office. Article VI of the Constitution of North Carolina provides, as to voters, that:

"Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the State except as herein otherwise provided."

Loss of this right is ordinarily referred to as "loss of citizenship," and laws are provided by which there may be a restoration of citizenship.

While I would not decide this question alone upon the right or otherwise of a particular person to vote, I use this as illustrative of the use of the word "citizenship" in the law and to support my statement that it implies more than mere residence.

While I think the question is perhaps a close one, and even might possibly be decided otherwise when presented to the Court, I think the better opinion is that citizenship in this State is accorded only to a person who was born in this country or who has been naturalized, as provided in the Federal laws. Therefore, a person of foreign birth who has never been naturalized in this country is not a citizen within the meaning of the statute entitling such person to admission into a State Hospital.

SUBJECT: ADOPTION OF MINORS; GUARDIANSHIP

1 June, 1937.

In your letter of May 24 you submit two further questions relative to the right of a resident alien to adopt a native born child.

We formerly ruled in this connection that the citizens or subjects of a foreign country could not adopt a child through our courts. However, we have made a very thorough research in this connection, and wish to withdraw the opinion to you of May 7.

Consolidated Statutes 191 (1) says that any one may petition for the adoption of a child who has "legal residence" in North Carolina. The question before us is whether or not "legal residence" in this connection means that the party must be an American citizen.

In Black's Law Dictionary it is said that "resident" may mean the same thing as "citizen." In Words and Phrases:

"'Legal residence' is synonymous with 'domicile,' and is defined to be residence at a particular place, accompanied with . . . proof of an intention to remain there for an unlimited time. Legal residence is the place of a man's fixed habitation, where his political rights are to be exercised and where he is liable to taxation. Legal residence, inhabitation, and domicile mean the same thing."

Definition of "citizen":

"The term 'citizen' has come to us from antiquity, and was used in the Roman Government to designate a person who had the freedom of the city and the right to exercise *all political and civil* privileges of the government."

A citizen is defined by Webster to be a "person native or naturalized, who has the privilege of voting for public officers and who is qualified to fill public offices in the gift of the people, . . ."

It is our opinion that a man might be a "legal resident" and at the same time not be a "citizen" in that he could not hold public office. Since our statute provides that a man may petition to adopt a child if he is a "legal resident," we are of the opinion that an alien who has been legally admitted for residence permanently in the country would be permitted to adopt a child under the provisions of the statute above referred to.

SUBJECT: OLD AGE ASSISTANCE; DEPENDENT CHILDREN; WHERE
APPLICATION FOR ASSISTANCE MADE

14 July, 1937.

Under the Old Age Assistance Act, Section 15, it is provided that "applications for assistance under this Act shall be made to the County Welfare Board of the County in which the applicant resides."

Under the Aid to Dependent Children Act, Section 45, it is provided that "applications for assistance under this Act shall be made to the County Welfare Board of the County in which the applicant resides." In both cases the provisions are the same. The word "resides" used in both sections does not mean the county in which the applicant has a settlement, but the county in which at the time the application is made the applicant is living.

If in the case of old age assistance or dependent children, the applicant does not have any settlement in any county in North Carolina, and is otherwise

eligible, the application is to be received by the county in which the applicant resides and acted upon by such county, but the award, when made, shall be paid entirely out of State and Federal funds. In case of dependent children, such provision is made only in the event both the applicant and the dependent children do not have any settlement in any county in North Carolina.

It will be necessary to make it clear to the various County Boards that the Old Age Assistance and Dependent Children Act has changed the rule as to county settlements so far as liability for awards are concerned for old age assistance and dependent children. In order that the award shall be made, it is not required that the applicant have a settlement in the county with which the application is filed and such county with which the application is filed is under the law made responsible for the payment of the award, when made.

There is only one condition under which the above stated rule does not apply. Under Section 20 of the Old Age Assistance Act, if any recipient moves to another county in this state, he is entitled to receive assistance in the county to which he has moved, but the county from which he has moved is required to pay the assistance for a period of three months following such removal. This means that where an application has been made in one county and the award made in that county, and thereafter the recipient moves to another county, this provision is applicable; and in cases in which no application has been made and in which there has been no award, this provision does not apply.

Under the Dependent Children Act, Section 50, a substantially similar provision is made, the language employed therein being as follows: "Any resident who moves to another county and continues to have such dependent children in custody in this state, shall be entitled to receive assistance in the county to which he has moved." Provision is likewise made that the county from which the recipient moves shall pay the assistance for a period of three months following such removal. Here again, there must have been an award in the county from which the removal took place for this provision to apply.

SUBJECT: OLD AGE ASSISTANCE AND AID TO DEPENDENT CHILDREN
ACT; INDIANS

13 August, 1937.

We have your inquiry as to whether Indians living on the Cherokee Indian Reservation have the benefits and liabilities of the Old Age Assistance and Aid to Dependent Children Act.

By Act of Congress, June 4, 1924, as amended by 45 Statute Laws 1094, approve June 25, 1929, the Eastern Band of Cherokee Indians were granted all the rights and privileges of citizens of the United States. Under *State vs. Wolf*, 145 N. C. 440, the Cherokee Indians residing in North Carolina were declared to be citizens of the State. Under Article XIV of the Constitution of the United States, these Indians are entitled to vote and serve on juries just as white persons.

Section 6, Chapter 288, Public Laws of 1937, known as the Old Age Assistance and Aid to Dependent Children Act, states that "assistance shall be granted under this Act to any person who: (a) Is sixty-five years of age and over; (b) Is a citizen of the United States." In addition to these requirements, there is, of course, the residence requirement, of which you are no

doubt aware. This office is of the opinion, therefore, that the Indians comprising the Eastern Band of Cherokees in North Carolina are entitled to the benefits arising from the Old Age Assistance and Aid to Dependent Children Act.

SUBJECT: ADOPTION OF MINORS; ABANDONMENT BY PARENTS; CONSENT

21 August, 1937.

Receipt is acknowledged of your letter of August 18th in which you ask my opinion as to the consent required of parents who have been convicted, and who are now serving a term in the State's Prison, for abuse of a child whose adoption is contemplated. You explain that the parents of this child refuse to consent to the adoption and inquire as to whether or not in order to have a legal adoption of this child, it is necessary that the consent of such parents be obtained.

In my opinion, the conviction of the parents of mistreatment of the child and the serving of a sentence therefor, should be considered as tantamount to an abandonment of the child, and under such circumstances, the consent of such parents to adoption of such minor is not required. As is expressly declared in Section 1, subsection 9, of Chapter 243, Public Laws of 1935, the provisions of this law eliminate the necessity of consent of such parents to the adoption of the child.

SUBJECT: AID TO DEPENDENT CHILDREN; STATUS OF ADOPTIVE PARENTS

27 September, 1937.

When a child is adopted under the North Carolina Statute, the adoptive mother and father have precisely the same relationship to that child as the natural mother and father, and, therefore, would come within the law with reference to receiving aid to dependent children for such adopted child.

SUBJECT: ELIGIBILITY OF MINORS (OVER SIXTEEN) TO MAKE APPLICATION FOR AID TO DEPENDENT CHILDREN IN BEHALF OF YOUNGER BROTHERS AND SISTERS

27 October, 1937.

I have your letter of October 26th inquiring as to the eligibility of a minor over sixteen years of age to make application for Aid to Dependent Children, the dependent children being his own brothers and sisters, under sixteen years of age.

In my opinion, you would be authorized to receive this application and if otherwise eligible for benefits, the same might be paid under the Aid to Dependent Children Act.

SUBJECT: ELIGIBILITY FOR OLD AGE ASSISTANCE AND AID TO DEPENDENT CHILDREN OF PERSONS WHO HAVE MOVED OUT OF THE STATE

27 October, 1937.

I have your letter of October 26th on the above subject. There is no reference in our statute to cases in which the recipient of Old Age Assistance and Aid to Dependent Children moves from the State of North Carolina to some other state.

Under ordinary conditions when a person leaves the State of North Carolina for the purpose of making his home in another state, the residence of the person in this state immediately terminates. It is my opinion that you are not authorized to make either Old Age or Aid to Dependent Children payments to any person who at the time the payment is made, is not a resident of this state. Therefore, in the cases mentioned by you, payment should be discontinued upon a change of residence from this state to another state by any recipient.

SUBJECT: AID TO DEPENDENT CHILDREN; ELIGIBILITY

5 November, 1937.

I have your letter of November 4th enclosing copy of a letter from Miss Lavinia Keys, Regional Representative, Federal Bureau of Public Assistance, quoting the opinion of the Legal Division of the Social Security Board recently issued with respect to the relatives of dependent children with whom they are living to be eligible for assistance, which would be recognized by the Federal Government.

It is my opinion that the words "father and mother" as contained in Section 35 and Section 36 of the Act, would include the adoptive father and the adoptive mother of a dependent child within the meaning of our Act. I am also of the opinion that the words "brother and sister" would include a brother or sister of the whole or half-blood, and that the words "uncle and aunt" would include an uncle or aunt by the whole or half-blood.

It is my opinion that the language of our statute is not broad enough to include a great grandfather, grandfather-in-law, grand-mother-in-law, great grandmother, adoptive brother or sister, uncle-in-law, aunt-in-law, great uncle and great aunt.

SUBJECT: LICENSING OF HOMES WHEREIN CHILDREN WHO ARE WARDS OF JUVENILE COURTS ARE BOARDED AND CARED FOR AT PUBLIC EXPENSE

29 December, 1937.

I have your letter of December 21st, asking my opinion as to whether or not it is necessary that all homes where children separated from their parents and wards of Juvenile Courts are boarded and cared for at public expense, must be licensed by the State Board of Charities and Public Welfare. C. S. 5067, to which you refer, provides that it shall be unlawful for any person, institution, or organization for the purpose of caring for or placing children to carry on such work or business without having in full force a written license therefor from the State Board of Charities and Public Welfare.

Section 6 of Chapter 226, Public Laws of 1931, makes substantially similar provisions.

Based upon these statutes and other provisions of laws contained in C. S. 5047, (3) and (4), C. S. 5048 and C. S. 1297 (43), to all of which you also refer, I agree with the conclusion which you reached that it is necessary for such homes, taking the responsibility of the care of children under the above stated circumstances, to receive a written license for such purpose from the State Board of Charities and Public Welfare, after necessary investigation by the said Board as to the fitness of such home for the care and supervision of the children.

RE: OLD AGE ASSISTANCE; PAYMENT OF AWARDS TO RECIPIENTS WHO MOVE
FROM ONE COUNTY TO ANOTHER

6 January, 1938.

Receipt is acknowledged of your letter of January 5th, asking my opinion upon the following statement of facts: A recipient of public assistance moves from one county in North Carolina to another. For three months after removal the county from which he moves continues to make payments. The county to which he moves is properly notified, and is willing to assume the responsibility, but has reached its quota and has no funds for the payment of this type of assistance and does not have any general fund available with which to take care of the situation. You inquire as to whether or not the county from which the recipient moves may continue payments after the end of three months.

Section 20 of the Old Age Assistance Act provides that when a recipient moves to another county, assistance shall be provided by the county to which he has moved, but that the county from which he moves "shall pay the assistance for a period of three months following such removal, not in excess of the amount paid before removal, and *thereafter assistance shall be paid by the county to which such recipient has moved.*"

A similar provision is found in the Act for Aid to Dependent Children, Section 50.

It is, therefore, my opinion that the county from which the recipient has moved does not have the authority to pay compensation after the end of the three months period.

SUBJECT: JUVENILE DELINQUENTS, SAMARCAND; AUTHORITY TO RECEIVE
FEDERAL COMMITMENTS

12 January, 1938.

I have your letter of January 12th in which you advise that the Federal authorities would like to make contract for the care of Federal juveniles with the State Home and Industrial School for Girls at Samarcand, and that the Board of Directors of this institution are inclined to be willing to co-operate and accept the commitments of Federal authorities of juveniles on a paying basis, to be approved by the Budget Bureau. You inquire as to whether or not, under C. S. 7334, the authorities of this institution would be authorized to receive juveniles committed by the Federal Courts to that institution.

In my opinion, they would not be authorized by our law to receive them. It is provided in C. S. 7334 that any girl or woman who may come or be brought "before any court of the State" "may be committed by such court for confinement in the institution aforesaid." The language employed in the Act does not include commitments by the Federal Court, but only by courts of this State. In the absence of legislative authority to receive such persons committed by the Federal Court, it is my opinion the institution would have no right to receive them.

SUBJECT: POWERS AND DUTIES OF BOARD RELATING TO PRISON REGULATIONS;
RESORT TO CORPORAL PUNISHMENT AS DISCIPLINE

12 January, 1938.

The Constitution of North Carolina, Article XI, Section 7, provides for the

creation of the State Board of Charities and Public Welfare, which was duly created by statute; C. S. 5004-5018. This section of the Constitution reads as follows:

"7. Provision for the poor and orphans—Beneficent provisions for the poor, the unfortunate and orphan, being one of the first duties of a civilized and Christian State, the General Assembly shall, at its first session, appoint and define the duties of a board of public charities, to whom shall be entrusted the supervision of all charitable and penal State institutions, and who shall annually report to the Governor upon their condition, with suggestions for their improvement."

Under this, the duties and powers of the Board are defined in C. S. 5006, and the first section relates to the powers of the Board with reference to supervision of State Prisons:

"1. To investigate and supervise, through and by its own members or its agents or employees, the whole system of the charitable and penal institutions of the state, and to recommend such changes and additional provision as it may deem needful for their economical and efficient administration."

At the 1933 Session of the General Assembly, the Highway Department and Prison Department were consolidated, under Chapter 172, Public Laws of 1933. That chapter contains the following provision with regard to the rules and regulations which may be made with regard to the State's Prison or the prison camps now under control of consolidated management.

"Sec. 5. The control and custody of all prisoners serving sentence either in the State's Prison or in the prison camps now under the control of the State Highway and Public Works Commission, herein provided for, and subject to all the rules and regulations of said Commission legally adopted."

In my judgment, the present power of the State Board of Charities and Public Welfare, with respect to the disciplinary regulations adopted by the State Highway and Public Works Commission, is confined to advisory measures, and the department has not the power and duty of approving the rules and regulations adopted by such State Highway and Public Works Commission. I think the authority now for making disciplinary rules and regulations reverts to C. S. 7721, as modified by the section of the 1933 Act referred to. Under the provisions of this section, the Board of Directors of the State Prison was authorized to adopt regulations as to discipline, and, under C. S. 7728, might include corporal punishment as a disciplinary measure.

In my judgment, therefore, as I have stated before, the State Board of Charities and Public Welfare has no control over this situation except such as may be exercised through its advisory powers and duties.

SUBJECT: ADOPTION OF MINORS; FOREIGN ADOPTIONS; EFFECT

18 January, 1938.

I have your letter of January 18th inquiring as to the effect of an adoption in a foreign country and the extent to which it would be recognized in this State as legal and valid.

The rule with respect to this matter is that the status created by adoption in another jurisdiction will be recognized by the laws of this State to such an

extent, at least, as it is not inconsistent with the laws and policy of this State. The general rule is subject to the qualification that the Courts of the particular State will not permit the statute of a foreign State to extend further than the local statute upon the same subject, nor to confer any greater rights.

Therefore, if the adoption were legally made in a foreign country having jurisdiction of the parties to the adoption proceedings, it is my opinion that it would be recognized as legal and valid in this State to the extent that there was no conflict with our policy or laws.

SUBJECT: ADOPTION LAWS; RETENTION OF LEGAL RESIDENCE IN NORTH CAROLINA

25 January, 1938.

The eligibility of adoptive parents under the jurisdiction of the Courts in this State depends upon a legal residence, but not actual domicile. In my opinion, the married couple who are missionaries to a foreign country, but who have apparently retained their legal residence in North Carolina, have the right to adopt a child in this State, notwithstanding the fact that their actual domicile for a greater portion of the time, or in fact, all the time, may be in Brazil.

SUBJECT: CARE AND MAINTENANCE OF CHILDREN; LIABILITY OF FATHER

25 April, 1938.

This office is of the opinion that the father of children cannot release himself of the responsibility for the care and maintenance of these children even though he lives separate and apart from his wife and children under a separation agreement. See *State vs. Bell*, 184 N. C., 701.

SUBJECT: OLD AGE ASSISTANCE ENDORSEMENT BY MARK ON CHECK

9 May, 1938.

The legality of an endorsement of a check by mark, is, under the laws of this State, dependent in no way upon whether or not the endorsement is witnessed. The necessity for witnessing such endorsements usually arises in determining the execution of the signature. It is for this reason that the practice in this State has been to have a witness present where an endorsement by mark is necessary.

That this is true can be seen from the case of *Devereux v. McMahon*, 108, N. C., 134., where the Court quoting from *State v. Byrd*, 93, N. C. 624, stated:

"A mark, like the signature of a party, is intended to be evidence of the fact that the party making it made it, and identifies himself with the paper-writing signed in the way and for the purpose indicated in it, and it is just as binding ordinarily without a subscribing witness as with one, but it may be proven as a signature may be by one who saw it made or who heard the maker himself acknowledge it to be his and the maker himself is generally a competent witness to prove that he made it."

SUBJECT: OLD AGE ASSISTANCE; CITIZENSHIP

31 May, 1938.

In your letter of May 21, you inquire as to whether or not under the eligibility requirements for Old Age Assistance, which include citizenship, a person who has committed a felony and whose right to vote and hold office has not been restored is to be considered a citizen within the meaning of the Act.

A person who is either a native or naturalized citizen of the United States who has been convicted of a felony thereby loses the right to vote and hold office. This, however, in my opinion, is only a matter of losing these privileges of a citizen. C. S. 385 provides that a person convicted of an infamous crime whereby the "rights of citizenship" are forfeited, desiring to be restored to the same may file petition, etc. Subsequent sections refer to restoration of rights of citizenship. The rights of citizenship to which reference is made are those of holding office and being entitled to vote. A person remains a citizen, but with the right to vote and hold office taken from him by the commission of an infamous crime.

A person who was a citizen before the commission of a felony would remain a citizen of the United States and of the State in which he resided. Therefore, it is my opinion that the conviction of a felony does not deprive a person claiming benefits under the Old Age Assistance Act, who is otherwise entitled to receive it.

SUBJECT: OLD AGE ASSISTANCE; DEATH OF RECIPIENT; ENDORSEMENT OF CHECKS PAID

30 June, 1938.

We have your letter of June 22, in which you enclosed a letter from Mr. J. T. Dinger, Federal Auditor in charge of the audit of your records. Mr. Dinger asks what constitutes the delivery of an Old Age Assistance check.

C. S. 2976, being a part of the uniform negotiable instruments law, defines delivery as follows: "Delivery means transfer of possession, actual or constructive, from one person to another." It is further provided by C. S. 2998 that where an instrument is no longer in the possession of the party whose signature appears thereon, a delivery is presumed.

Under these statutes it becomes rather plain that a check or other negotiable instrument is delivered when possession is intentionally transferred. It has been held that the placing of a check in the mail, addressed to the payee, constitutes a delivery.

This seems to answer the question asked by Mr. Dinger. We gather, however, that he was also interested in determining whether or not a check which has been delivered, but which has not been endorsed by the payee prior to his death, should be returned to the county authorities for cancellation. In other words, is the personal representative of an Old Age Pensioner who dies following the delivery of the check, but before its endorsement, entitled to endorse such check and receive payment thereon?

This presents a serious question and one about which there seems to be considerable difficulty. In a letter dated April 30, 1938, addressed to Mr. J. B. Hall, Superintendent of Public Welfare for Halifax County, this office ruled that the payment due to an Old Age pensioner and actually delivered

by way of check at the time of his death, does not abate. Upon careful consideration, we reaffirm this position. While it may be true that the payments made under the Old Age Assistance Act constitute benefits conferred upon a particular class of persons; nevertheless, where a payment actually becomes due during the lifetime of the applicant, he is entitled to it. We do not see how his death subsequent to that instant can affect the obligation which the State owes under the Act.

It is a general rule that the administrator, or other personal representative of the deceased, has the authority to endorse checks made and delivered to him prior to death. Mr. Brown of your Department, in a conference with him the other day, suggested that Clerks of Court are hesitant about administering upon funds of this type under C. S. 65 (a). In spite of this fact, we are of the opinion that the check, if endorsed by a duly qualified administrator of the Old Age pensioner, is properly endorsed.

OPINIONS TO DEPARTMENT OF CONSERVATION AND DEVELOPMENT

SUBJECT: TAXATION—CONSTITUTIONAL LIMIT; CURRENT EXPENSE, 15c;
LEGISLATIVE AUTHORIZATION

29 July, 1936.

In your letter of July 27, you inquire whether or not Tyrrell County would have authority to levy a special tax for forest fire control, which would result in the county exceeding the constitutional limitations of 15c on \$100.00, imposed by Article 5, Section 6 of the North Carolina Constitution.

The North Carolina Supreme Court has held that for special purposes, with the special approval of the Legislature, the County Commissioners may exceed the limitations of Article 5, Section 6, without the vote of the people, provided those special purposes are for the necessary expenses of the county. See *Glenn v. Commissioners*, 201 N. C. 233. A careful search has failed to reveal either a special or general act of the Legislature authorizing a special tax in excess of the constitutional limitations for purposes of forest fire control on any of the counties. It is the opinion of this department in the absence of such special approval of the Legislature, that Tyrrell County could not lawfully impose a tax which would exceed those limits.

SUBJECT: AUTHORITY OF DEPUTY GAME AND FISH PROTECTORS, ETC.

18 November, 1936.

I have your letter of November 18. Under the provisions of Chapter 486, Public Laws of 1935, Section 8(b), the Commissioner is authorized to employ such game protectors, deputy game protectors, etc., as shall be necessary for the proper carrying out of the provisions of this Act. Under Subsection (d) of said Section of said Act, it is provided that the Commissioner and each of his deputies shall have the power to execute all warrants issued for the violation of this Act and serve subpoenas issued for examination, investigation or trial of offenders against any of the provisions of this Act. Other authority and powers are given to such deputies.

You call my attention to the appointment of Mr. H. B. Seawell under the provisions of this law. In the appointment of this deputy, it is provided that he is assigned particularly to duty in Duplin County.

The question arises as to whether or not he has the power to serve warrants and make arrests and perform his other duties outside of Duplin County. In my opinion, the Deputy has authority to act anywhere within the State of North Carolina. Under the Act, he is appointed as a deputy to the Commissioner, whose duties and powers are statewide. Merely because this deputy is particularly assigned to duty in Duplin County does not limit or circumscribe the extent of his authority throughout the State at any point he may be called upon to act.

You inquire as to whether or not the Deputy Game Protector has authority to go upon private lands on which he has been specifically warned

to stay off in order to make arrests or in the normal course of the performance of his duties.

It is my opinion, that under the provisions of the law the Commissioner or any of his deputies are authorized to go upon any land, whether warned to stay off or not, to make arrests or perform the other duties affixed to his office by virtue of the provisions of the statute.

SUBJECT: GAME LAWS; CONFISCATION OF PROPERTY

3 December, 1936.

This office has very carefully considered the question of the confiscation by members of your organization of guns which have been used by hunters who have not secured hunting licenses, and we are of the opinion that your Department, nor your agents, have sufficient authority under the law for such action.

Section 8 (d), Chapter 486, Public Laws of 1935, it is true, provides that certain instruments and devices, which are illegally used in taking game, may be seized and confiscated; however, in the next succeeding Subsection there is no provision for the ultimate disposition of the devices described other than those named in said Subsection. There is no provision that guns so confiscated may be put up and sold in the same way and manner as "heads, antlers, horns, hides, etc." Moreover, Section 20 of the Act provides that game, animals, or birds may not be taken with certain devices therein described. It does say that a shot gun larger than a number ten gauge may not be used, but we understand that in this instance a so-called "legal gun" was confiscated.

We are of the opinion that unless there was a specific provision in the act actually providing that the arms and ammunition of a person who was hunting without a license could be confiscated, that you and your deputies would have no authority to do so.

SUBJECT: FISH AND FISHING; PRIVATE FISHING PONDS OR LAKES

7 May, 1937.

I have conferred with Mr. Kugler with regard to the constitutionality of Rule 13, adopted by the Board of Conservation and Development. This regulation defines a private fish pond and provides that all inland fishing regulations shall apply to fishing in private fish ponds or lakes, as defined except that the owners and their families may take fish as they deem advisable from the private ponds. It has been suggested that this regulation may impinge upon the constitutional property rights of the owner of the pond in preventing him from selling to others the right of fishing in such pond in closed season.

It is to be observed that the regulation makes applicable all of the inland fishing regulations as to these ponds with the exceptions stated. Rule three prescribes the closed season in inland fishing waters from April 1st to May 10th, and during that period fishing by any person except as above stated is prohibited. It is my opinion that this regulation is constitutional as applied to a person who would fish even on private ponds during the closed season and that a person who violated the regulations in this re-

spect might be subjected to indictment. Authority for this view is found in the case of *State vs. Sermons*, 169 N. C., 285, in which conviction was sustained as to an oyster dealer who was selling oysters out of season taken from private beds. The court says in this case:

"The provisions establishing a closed season and requiring dealers to operate only under a regular license are among the usual methods of regulating the industry and it is well understood that the rights of individual owners are also subject to reasonable State regulations affecting their interests. *State v. Sutton*, 139 N. C., 57; *State vs. Gallop*, 126 N. C., 983; 13 A. & E. (2) ed. pp. 573, et seq."

In *State vs. Sutton*, *supra*, the court says:

"The right to regulate fisheries, even on private property is settled beyond controversy, * * *".

The effect of the regulations is to prohibit a person other than the owner or his family from fishing of inland waters, including private ponds, within the closed season. This regulation operates upon the person who does the fishing and any property right of the owner of the pond is subject to whatever restrictions this regulation may impose upon fishing in such a pond.

SUBJECT: REQUIRING SUFFICIENT NUMBER OF LIFE PRESERVERS TO BE CARRIED
ON EACH BOAT OPERATED FOR HIRE

19 May, 1937.

You inquire if there is any legal authority which would support your Department in requiring sufficient life preservers for each passenger to be carried on boats operated For Hire on all State-owned lakes.

Section Nine, Chapter 122, Public Laws of 1925, provides, among other things, that the Board of Conservation and Development shall have charge of recreational areas owned or acquired by the State, including lakes described in Section 7544 of the Consolidated Statutes, and it may make such rules and regulations as it may deem advisable to govern the work of the Department.

Chapter 165, Public Laws of 1929, provides in effect that all lakes now belonging to the State, having an area of fifty acres or more, shall always remain the property of the State for the use and benefit of all the people of the State, and shall be administered, as provided for other recreational areas now owned or to be acquired.

Section One of Chapter 516, Public Laws of 1933, provides that all recreation, including hunting and fishing, etc., in, upon, or above, any or all of the State lakes referred to in Section 7544 of the Consolidated Statutes, and subsequent laws, may be regulated in the public interest by the State Agency having administrative authority over these areas.

As stated above, Chapter 122, Public Laws of 1925, confers upon the State Department of Conservation and Development the control of areas of this description. We, therefore, are of the opinion that the regulation issued by you relative to the requirement that all boats operated For Hire on lakes of this character are under the supervision and control of the Department of Conservation and Development, and that the regulation is-

sued by you requiring all boats carrying passengers For Hire to be equipped with life saving devices is within the authority of your Board by virtue of the laws above referred to.

SUBJECT: STATE ADVERTISING SCHEME; MAKING CONTRACTS

8 July, 1937.

Chapter 160 of the Public Laws of 1937 appropriates \$250,000 for an advertising scheme to be carried out by the Department of Conservation and Development. Section 1 of this Act reads as follows:

"Section 1. That it is hereby declared to be the duty of the Department of Conservation and Development to map out and to carry into effect, under the direction and with the approval of the Director of the Budget, a systematic plan for the nation-wide advertising of North Carolina, properly presenting, by the use of any available advertising media, the true facts concerning the State of North Carolina and all of its resources."

You inquire whether or not the Department of Conservation and Development has the right to directly make contracts for this advertising.

In my opinion, the section above referred to does not go quite that far. I think that it is the intention of the Act to permit the Department of Conservation and Development to plan advertising under the supervision of the Director of the Budget, but, when this is done, I can see no inconsistency between this Act and subdivision (c) of Chapter 261 Public Laws 1931, giving the power of actually making contract to the Director of Purchase and Contract.

Amongst other things, Section 1, subsection (c), to which I have referred, provides that the Director of Purchase and Contract shall have the power to "purchase or contract for all telephones, telegraph, electric light power, postal and any and all other contractual services and needs of the State Government, or any of its departments, institutions, or agencies; or in lieu of such purchase or contract to authorize any department, institution or agency to purchase or contract for any or all such services."

Reading the two laws together, it is my understanding that either one of two courses may be pursued. The first is that the plan and scheme of the advertising be mapped out, by the Director of Conservation and Development under the direction and with the approval of the Director of the Budget, and when this is done the matter be turned over to the Director of Purchase and Contract, who is empowered to make the contracts for the advertising according to the plan and scheme so adopted; or, second, that the power to make such contracts be delegated to the Director of Conservation and Development under section 1, subsection (c) of Chapter 261 Public Laws 1931, creating the Division of Purchase and Contract.

SUBJECT: TORTS; PERSONAL INJURY; STATE NOT LIABLE

21 July, 1937.

You have forwarded to me a letter from Mr. W. H. Rogers, of Danville, Virginia, who represents a client who desires to assert a claim for personal injury sustained by him through a collision with a State car operated by

Mr. J. C. Oakes, on the Franklin-Danville Turnpike, in Pittsylvania County, Virginia. It is claimed that a colored boy named Thompson was knocked off his bicycle and that the bicycle was destroyed and the boy's leg was broken, and he sustained other injuries.

Mr. Rogers suggests that unless the matter is adjusted by the State, he will institute an action, as I understand his letter, against both Mr. Oakes and the State of North Carolina.

I beg to advise that the State of North Carolina is in no way legally responsible for any injury sustained by this colored boy and, furthermore, that, under the laws of both North Carolina and Virginia, Mr. Rogers will not be able to maintain any action against the State in the courts of Virginia.

SUBJECT: HUNTING; GOING ARMED ON SUNDAY

27 September, 1937.

Supplementing a letter of this Department dated October 1, 1935, we advise that there is no provision in the game laws, Chapter 485, Public Laws of 1935, which repeals or modifies the provisions of C. S. 3956, which relates to hunting and going armed on Sunday.

SUBJECT: RIPARIAN RIGHTS AS TO HUNTING AND FISHING; LETTER OF
MR. RUPERT E. WEST

29 October, 1937.

In reply to your inquiry of October 28, 1937, based upon letter of Mr. Rupert E. West, I beg to advise that owners of property along a navigable stream or water have no control or dominion thereof beyond the low water mark. *State v. Eason*, 114 N. C. 787.

So far as the rights of the riparian owner are concerned, these would not be violated by placing floats outside of this limit and off the property of the riparian owner.

SUBJECT: HUNTING LICENSE; UNPROTECTED GAME

5 November, 1937.

I have your letter of November 5th in which you request my opinion as to whether or not a person is required to have a hunting license in order to allow him to legally "take" unprotected birds and animals, other than those persons who are expressly excepted from the law requiring a license.

Section 12 of the North Carolina Game Law provides as follows:

"No person shall at any time take any wild animals or birds without first having procured a license as provided by this Act * * * * *"

This provision requires that any person taking any wild animals or birds, without regard to whether or not such wild animals or birds are protected or unprotected, shall procure a license as provided in the Act. I am, therefore, of the opinion that a person who takes any kind of wild animals or birds, whether protected or not, must procure a license, except those per-

sons who are by statute exempted from the requirement as to securing a license. This includes persons exempted by Section 14 of the Act and persons killing game when injurious to agriculture, as provided in Section 4(C).

SUBJECT: FISH AND GAME LAWS; POLICE POWERS; POWER OF ARREST

6 December, 1937.

C. S. 1885 authorizes the Fisheries Commissioner, Assistant Commissioners, and Inspectors to arrest, without warrant, persons violating the fishing laws in their presence. You, of course, would have authority to arrest persons any where within the State, and within the three-mile limit, for violation of the fishing laws, either with or without warrant.

SUBJECT: HUNTING ON SUNDAY; JURISDICTION OF DEPT. CONSERVATION AND DEVELOPMENT

10 December, 1937.

Some time ago, I received an inquiry with regard to the jurisdiction of the Department of Conservation and Development as to hunting on Sunday. The particular inquiry related to C. S. 3956, which constitutes going armed or hunting on Sunday a violation of the State Sunday and Holiday Law.

As the inquiry was from a private source, I was not permitted by the rules of this office to give any advice on the subject to that inquirer. I see, however, that some misunderstanding has arisen about the matter, and I think it is best, both for this Department and yours, that it be clarified.

I am, therefore, writing to say that while I think the enforcement of the law which I have just cited is properly left to the local enforcement officers, since its purpose is to secure a quiet observance of the Sabbath, nevertheless, there is a law which may properly be considered as intended for the protection of game and, therefore, its enforcement would come within the jurisdiction of the Department of Conservation and Development and of the Game Wardens. This may be found as Article V of the Game Laws, being C. S. Section 2122, reading:

"If any person shall hunt or shoot any wild fowl or game bird on any day after the hour of sunset, or before the hour of daylight, or shall use any gun other than can be fired from the shoulder, or shall hunt or shoot wild fowl, birds, or game of any kind on Sunday, he shall be guilty of a misdemeanor."

Numerous suggestions have come to me that a very decided threat to the preservation of game comes from the fact that Sunday seems to have been set apart, in an increasing fashion, by great numbers of people as the time to engage in this sport.

While my opinion has not been asked on the question, I feel that it is not amiss to call your attention to this statute, as I know it is your earnest desire to enforce all laws which properly come within your jurisdiction necessary to a preservation of game.

SUBJECT: REGULATION OF SHIPMENT OF WATER PRODUCTS

10 January, 1938.

I have your letter of January 8th referring to the power of your Department to regulate shipment of fish, oysters, etc. C. S. 1881 provides as follows:

"The Fisheries Commission Board shall have the power and authority to make such rules regulating the shipment and transportation of fish, oysters, clams, crabs, escallops, and other water products, as it may deem necessary."

This is taken from Section 4 of Chapter 333, Public Laws of 1919. The authority there given to the Fisheries Commission has been transferred to your Department.

I believe the quotation of this section furnishes you the necessary answer to your inquiry. Very broad and complete authority is thereby given to your Department to adopt rules regulating the shipment and transportation of seafoods, and this statute furnishes you the basis for the action which I understand your Department contemplates. Any rules or regulations adopted would, of course, have to be reasonable and not arbitrary.

OPINIONS TO COMMISSIONER OF BANKS

SUBJECT: LOANS BY BANKS; LIMITATION AS TO AMOUNT

12 August, 1936.

I have your letter of August 10, attaching copy of a letter from Mr. W. S. Johnson, President of the Peoples Savings Bank & Trust Company of Wilmington, North Carolina. You ask the opinion of this department as to the right of this bank to make an industrial loan of \$115,000, to run for a period of six years with annual amortization with a certificate from the Reconstruction Finance Corporation guaranteeing a 90% participation.

If I understand the transaction right, it is in effect a loan from the bank itself, because the money of the bank is put out upon it. If this is true, there is little need to go further, because such a transaction is not protected by C. S. 220 (a), permitting banks, fiduciaries, etc., to invest in bonds guaranteed by the United States, as the nature of the security does not at all qualify, and in my judgment this is the only section that approaches any authority for the transaction. I mention it only by way of exclusion.

The fact that the bank is entirely secure from loss under the transaction does not afford any authority to go contrary to the statute, nor can I see that in this case the fact that the amount to which the bank may be said to participate is less than the limitation under 220 (d) justifies a conclusion that the 90% is not a definite amount of the money put up, and, in fact, loaned by the bank.

Nor can we be very definite as to the purpose of C. S. 220 (d), so as to exclude its application to this subject in trying to reason the thing out from a practical point of view. In part, at least, the statute is intended to protect the bank against the increased hazard which might arise from lending so much money to one person, firm, or corporation, on the theory that it should not put all its eggs in one basket. Perhaps, also, it was the purpose of the statute to prevent the bank from becoming a mere means of accommodation to a few people, whereby its usefulness to the community generally might be destroyed by such absorption of its funds.

SUBJECT: BANKS AND BANKING; BANK AS TRUSTEE VOTING ITS OWN
STOCK HELD IN TRUST

14 October, 1936.

I have read the letter of Mr. W. H. Wood, of the American Trust Company, upon this subject, as well as that of Mr. P. C. Whitlock, Attorney for the Bank, and the attached memorandum.

Such examination as I have been able to make on the questions presented, that is, the right of a trustee bank to vote its own stock, does not disclose any North Carolina Supreme Court opinion. I think, however, that the better view to take of the matter is that the exercise of such a right or privilege is so inconsistent with public policy that it should not be allowed.

Of course, there are many trusts created where the trustee has a large interest in the subject of the trust and might be said to have self interest

in its administration. In these cases there is usually such relation between the parties as to make this situation safe. At any rate, the trustor well understands what he is about when the trust is established.

Here, however, we have an instance where the trustor owns shares of stock in the proposed corporate trustee and conveys that stock to such corporation in trust. The right to vote that stock, if it exists, is incidental to its holding by the trustee and perhaps not the main object of the trust. However, it does give the corporation an unusual opportunity to direct its own affairs and at critical moments to cast the balance of power against the interest of a portion, at least, of its stockholders.

For a proper decision of the question, I think it is proper to look to the consequences which might follow the power thus given into the hands of the corporation itself; and I may say that it is the power to do mischief rather than the source of the power or the capacity in which the corporation might act which we must scrutinize. Conceded that in most instances a trust would be honestly administered, and with a sole view to the interest of the beneficiary, nevertheless, the power to do otherwise will be just as great, no matter whether the bank holds as trustee or holds in its own right.

Public policy, and, in many States, statute law, will not permit a corporation to vote its own stock owned or held by it as stock which has been purchased for re-issue or what is sometimes called "treasury stock." C. S. 1174; Fletcher Cyc. Corp. Vol. 5, S. 2041; Thompson Corp. (3rd) S. 959; United States v. Columbian Ins. Co., 2 Cranch, 266; Clark v. National Steel and Wire Corp. 82 Conn. 178.

An analogy may be found in the rule as to pledged stock. While the pledgor or pledgee is permitted to vote the stock under laws especially applicable, (for North Carolina see C. S. 1174), when the stock is pledged to the corporation issuing it, the right to vote it is "cut off." First Mortgage Bond Homestead Association v. Baker, 157 Md. 309, 145 Atl. 876, Fletcher Cyc. Corp. Sec. 2034.

In my opinion that same public policy which forbids the voting of stock so held would also forbid the voting of stock to which the corporation has a legal title, although as trustee for a beneficiary, although our statute may not be considered sufficient to cover the precise situation.

SUBJECT: BANKS; AUTHORITY TO LEND TO ALCOHOLIC BEVERAGE CONTROL
BOARDS UNDER THE 1937 ACT

10 June, 1937.

You make four specific inquiries relating to the subject of loans by banks to Local Alcoholic Beverage Control Boards, based upon the letter of Mr. B. R. Roberts, Executive Vice-President of the Durham Loan and Trust Company. These questions are as follows:

- "1. Does the local Board of Control have authority to borrow money?
- "2. If they do have authority to borrow money, would it be an obligation of the county?
- "3. Would it have to be approved by the Local Government Commission?
- "4. If it is an obligation of the county, would it be necessary for the bank to secure its deposits and pay interest thereon?"

The questions which you ask are so related that I will probably not be able to answer them categorically, but I am sure the answer will be full.

Section 10, Subsection (i) of the Alcoholic Beverage Control Act, passed by the 1937 General Assembly, Chapter 49, Public Laws of 1937, gives to the Alcoholic Beverage Control Boards the power:

"To borrow money, guarantee the payment thereof and the interest thereon, in such manner as may be required or permitted by law, and to issue, sign, endorse and accept checks, promissory notes, bills of exchange and other negotiable instruments and to do all such other and necessary things as may be required or may be convenient in the conduct of liquor stores in its county."

From this, it may be stated that such Local Alcoholic Beverage Control Board is certainly given the power to borrow money and guarantee its payment "in such manner as may be required or permitted by law"; and it must be necessarily inferred that the banks have the corollary power of lending money to such Alcoholic Beverage Control Boards. There arises immediately, however, the question as to where the liability for repayment of such loans rest; in other words, who is the debtor, and in what manner and against whom the bank may proceed to collect the loan in case of default.

Perhaps the question as to whether or not such a loan is an obligation of the county cannot be authoritatively answered until it is decided by the Supreme Court. However, I think the better opinion is that it is not such an obligation of the county.

In the case of *Hill, et al. vs. Greene County*, 209 N. C., 4, the plaintiffs on a similar statute argued that the obligation created by a loan to the Alcoholic Beverage Control Board was that of the county, and in support of that argument referred to the powers and duties which were given to the Board of County Commissioners under the act,—such as appointment of members of the board, control of deposits, division of profits, etc., as being indubitable insignia of county authority and county liability. The whole system and undertaking was thus treated as a county enterprise.

The point was not decided by the court in any of the cases coming before it, as the court held that the plaintiffs were not in position to carry on the controversy.

I cannot accept the position above referred to as a sound construction of the law because I think in so grave a matter county liability should not be predicated on interferences from such expressions as I find in the act, which might be, with equal propriety, referred to the necessity and convenience of territorial control rather than as indicating that the activities set up under the statute constitute a county enterprise with the inference of county liability. I hardly think that the Legislature intended to give to the Local Alcoholic Beverage Control Boards the unreserved power to pledge the credit of the counties for the purchase of intoxicating liquors, many of which counties had defaulted in their legitimate obligations and many of which had found it impossible to collect sufficient taxes to care for the poor and furnish sufficient school facilities and furnish sufficient buildings to carry on the schools.

If, however, I am mistaken in this, and the obligation of such a loan is that of the county, it, of course, comes within the constitutional debt limi-

tation amendment; and even if the county had reduced its outstanding indebtedness in the preceding fiscal year sufficiently to cover the loan, still Article VII, Section 7, of the Constitution will be in the way of creating such a debt without submission to a vote of the people. Certainly, if the schools are not a necessary governmental expense of the county, *Frazier vs. Commissioners*, 194 N. C., 49, 61, obligations for the purchase and sale of liquor by county could not be considered such necessary expense; in fact, it is not, in my opinion, a governmental expense at all, *Benson vs. Johnston County*, 209 N. C., 71, and if obligations of that character are made at all, the question must be submitted to a vote of the people to ascertain whether they choose to absorb the limited credit of the county in the purchase of liquor or extend it to the more pressing demands of civilization and humanity above mentioned.

I am further of the opinion that if the obligation is that of the county, the loan must be passed upon and receive approval of the Local Government Commission as are other loans to counties as provided in the Local Government Act.

It is clear that the proceeds of any loan made under these conditions, if it is a county obligation, must be deposited and protected as other county funds. The present Alcoholic Beverage Control Act, however, is unlike the Pasquotank and New Hanover Acts, in that the present law does not contain the same administrative provisions with respect to deposit and disbursement of the funds of the Alcoholic Beverage Control Boards. Section 21 of the act requires only that quarterly certain parts of the fund should be paid into the County Treasury.

SUBJECT: BANKS AND BANKING, RENTING SAFETY DEPOSIT VAULTS

24 June, 1937.

Upon your inquiry based upon the letter of Mr. T. C. Wilson on the above subject, I beg to say that I can find no law which would make the renting of safety deposit boxes such an essential part of banking as would bring it in any way under your jurisdiction. I am also of the opinion that such facilities may be rented by private concerns and corporations not engaged in the banking business and that the renting of these boxes by T. C. Wilson and Company would not be a violation of the law.

SUBJECT: BANKING LAWS; TAXABILITY OF SHARES IN THE FEDERAL SAVINGS AND LOAN ASSOCIATION

13 August, 1937.

We have a letter from Mr. U. C. Speed, President of the Carolina Industrial Bank in Asheville, which was referred to this office by your department. Mr. Speed enclosed a newspaper clipping of the Asheville Federal Savings and Loan Association which states:

"Your savings here free from local ad valorem and State intangible tax."

The inquiry is made as to whether such an advertisement is valid. As you may know, the Federal Savings and Loan Associations are set up pursuant to Title 12, U. S. C. A., Section 1464. Section 1464 (h) of this Act states:

"No State, territory, county, or municipality, or local taxing authority, shall impose any tax on such associations of their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

Title 12, U. S. C. A., Section 548, provides methods by which the States may tax the shares of National Banking Associations located within their limits. It is expressly provided, however, that the tax imposed by the State shall not be at a greater rate than is assessed upon the moneyed capital in the hands of individual citizens of such State coming into competition with National Banks. So it may be seen that the only limitations upon State taxation of shares in National Banking Associations is that such taxes be not discriminatory.

Savings placed in these Federal Savings and Loan Banks are represented by shares of stock in the banks themselves, rather than by deposits. In fact, they may be more accurately styled "investments."

Section 701, Chapter 127, Public Laws of 1937, would not cover savings placed in these banks, for this section is confined to bank deposits. Section 706 of this chapter covers shares of stock, but this section specifically exempts stocks "in banks, banking associations, trust companies, insurance companies, and building and loan associations, which are otherwise taxed." Such stocks are treated by our Machinery Act as exemptions. It would seem, therefore, that the statement which appears in the newspaper clipping is correct, for there is no State taxation and no local ad valorem tax on these shares of stock.

Mr. Speed also asks what penalties attach for the failure of banks to set up records as provided in Section 701, Chapter 127 of the Public Laws of 1937, this being the section devoted to banks upon bank deposits. Of course, this section, as shown above, does not apply to Federal Savings and Loan Associations, but for other banks the penalty statute (Section 336) makes it a misdemeanor to fail to keep such records, and upon conviction the offender is liable for a fine of not more than \$500.00. In addition to this, the penalty section in the intangible tax article (Section 713) provides for a penalty of 100% of the amount of the tax for failure to report intangibles taxable under this article.

SUBJECT: C. S. SECTIONS 220 (D) AND 220 (B); CHARACTER OF TRANSACTION
AS LOAN OR INVESTMENT; LIMITATION OF LOANS

4 September, 1937.

You inquire in your recent letter as to whether or not an account of F. W. Craigie & Company with a State Bank constitutes an investment by the bank as a broker's loan.

Under a verbal agreement, certain bonds are carried by the bank for the brokers with a guarantee by the brokers to repurchase at a given price, the bank meanwhile receiving for its advances the same rate of interest which is stipulated in the bonds.

In my opinion, this does not constitute an investment by the bank in its own behalf, but because of the agreement and guarantee on the part of the brokers to repurchase the bonds, and the payment meanwhile of the stipulated rate of interest to the bank, it assumes the character of a loan. The form of the transaction is not as material as its substance, and the guar-

antee by the brokers to repurchase the bonds is substantially nothing more than an arrangement by which such broker is required to pay the money advanced and take up his security therefor.

Such a transaction would, in my opinion, come under C. S. 220 (d), limiting the total amount of loans which the bank can make.

SUBJECT: STATUTORY BAD DEBTS; PAST DUE MUNICIPAL BONDS; DEFAULT OF PRINCIPAL AND INTEREST

29 September, 1937.

Answering your question based upon letter of Mr. Erskine Duff, Assistant State Bank Examiner, of date September 25, 1937, upon the above subject, I beg to advise that defaulted municipal, county, or corporate bonds, either by reason of non-payment of principal or interest, must be classed as "statutory bad debts" under C. S. 221 (j) (e), when they have not been placed in process of collection.

Note that such bonds should be so classified if they have become due and unpaid and not put in process of collection, and on which interest for one year or more is due and unpaid.

However, debts which are "well secured" are not to be so classified.

Security in this sense must be held to refer to collateral security of some nature which may be resorted to for the payment of the debt, together with or independently of the direct obligation of the debtor.

SUBJECT: BANKS; POWER TO BORROW FROM FEDERAL DEPOSIT INSURANCE CORPORATION

16 November, 1937.

You have referred to us a letter from the Federal Deposit Insurance Corporation regarding the power of the Peoples United Bank, of Southport, North Carolina, to borrow from the Corporation. The Peoples United Bank is selling its assets and liabilities to the Waccamaw Bank & Trust Company, of Whiteville, North Carolina, but the Waccamaw Bank is unwilling to purchase a portion of the assets of the Peoples Bank. The Peoples Bank has made application to the Federal Deposit Insurance Corporation for a loan not to exceed \$65,000.00, and has offered as security for its note as evidencing such loan a pledge of the assets not acceptable to the Waccamaw Bank.

In considering this application, the Corporation has inquired as to the right of the bank to borrow and pledge assets of the kind and value contemplated, and the right of the bank to become indebted to the Corporation, and whether it is necessary that the proposed transaction be authorized by the holders of all the debentures, or whether the transaction can be authorized by the holders of two-thirds of the outstanding common stock.

C. S. 220 (a), subsection 5, provides as follows:

"Subject to the approval of the Commissioner of Banks and on the authority of its Board of Directors, or a majority thereof, banks shall have the power to enter into such contracts, incur such obligations, and generally do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions or to their depositors,

creditors, stockholders, conservators, receivers, or liquidators, by virtue of those provisions of section 8 of the Federal Banking Act of 1933, which established the Federal Deposit Insurance Corporation and provided for the insurance of deposits, or of any other provisions of that or any other Act or Resolution of Congress to aid, regulate, or safeguard banking institutions and their depositors."

Under this section banks are empowered to borrow from the Federal Deposit Insurance Corporation on the authority of a majority of their Board of Directors, subject to the approval of the Commissioner of Banks, any sums which they have authority to borrow in the exercise of regular banking functions and may, of course, pledge their ordinary assets to secure these loans. It is not necessary that the proposed transaction be authorized by the holders of the debentures or by the stockholders. The statute reposes the authority to incur such obligations entirely in the hands of the Board of Directors and Commissioner of Banks.

SUBJECT: MORRIS PLAN AND INDUSTRIAL BANKS; AUTHORITY TO PAY DEPOSITS BY CHECK

29 December, 1937.

C. S. 216 (A) defines the term "bank" to mean any corporation, partnership, firm or individual receiving, soliciting or accepting money or its equivalent on deposit as a business and excepts from this definition among other businesses, Morris Plan Companies and industrial banks.

C. S. 220 (A) et seq. authorizes the organization of industrial banks and in the powers expressly given them by Statute nowhere will it be found that such organizations as therein defined are given the power to engage in a general banking business. As a matter of fact the Statutes of the general law relative to banks, which are applicable to industrial banks, are set forth in C. S. 225 (M) and nowhere in these sections will it be found that such industrial banks are authorized to receive deposits of funds subject to withdrawal or to be paid upon the checks of the depositor.

SUBJECT: CONTRACT BETWEEN KIRCHOFER AND ARNOLD AND BRANCH BANKING AND TRUST COMPANY; HOLDING OF BONDS

31 March, 1938.

Consolidated Statutes 220 (d) is as follows:

"The total direct and indirect liability of any person, firm, or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent of two hundred and fifty thousand dollars, or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten per cent of the excess of two hundred and fifty thousand dollars of the unimpaired capital and permanent surplus of the bank;"

Under this Section, the lending power of the Branch Banking and Trust Company to such person, firm, or corporation is approximately \$105,000.00.

I have exhibited to me a proposed contract to be executed by Kirchofer and Arnold on one part and the Branch Banking and Trust Company on the other part, which would effect a sale of \$165,000.00 State of North Caro-

lina 2½ per cent Bonds at a total cost of \$165,000.00, or \$1,000.00 per Bond, plus accrued interest.

The contract provides that if the Bank should sell said securities within six months of the date of contract and the sales price should be less than the price at which the Bank has purchased the same, Kirchofer and Arnold will, on demand, pay the loss which the Bank shall so sustain, provided prior to selling, the Bank shall have offered said securities to the seller.

While the transaction involved in the so-called purchase and sale of these bonds between Kirchofer and Arnold and the Branch Banking & Trust Company is slightly different from the transaction before me at that time, I do not think that it is essentially so to bring it from under that rule.

In my opinion, a transaction of this sort whereby the Bank exchanges its money for the bonds of its customer and the customer agrees either to purchase the bonds back within a stated period or to pay to the Bank the loss sustained upon the sale of the bonds to another, looking through the form to the substance, must be classed as a loan.

In short, Kirchofer and Arnold agree to save the Bank harmless from loss by reason of selling its own bonds. There could be no consideration of which I can conceive to support this obligation on the part of Kirchofer and Arnold, except the loan of the money to it and a corresponding obligation to return that amount to the Bank unimpaired.

For this reason, it is my opinion that the transaction is in the nature of a loan and prohibited by the Section of the law above quoted.

SUBJECT: BANKS AND BANKING; SECURING DEPOSITS BY
ASSIGNMENT OF ASSETS

30 April, 1938.

You request an official opinion concerning the right of a State bank to secure bankruptcy deposits by a portion of its assets.

Under the cases of Page Trust Company v. Rose, et al, 192 N. C. 673, and Richmond County v. Trust Company, 195 N. C. 545, we are of the opinion that State banks do have specific authority to pledge a portion of their assets as security for bankruptcy funds. You will notice that in the Page Trust Company Case, the decision of the Court was rested upon the broad grounds that in the absence of statutory prohibition, a bank occupies the position of debtor and is authorized under general law to secure a creditor who lends money to it. The Court, on page 676, stated:

"There is no statute in this State forbidding a transfer or assignment by a bank of its property as security for one who is a depositor in the bank. Whether a sound policy forbids such transfer or assignment must be determined by the General Assembly and not by this Court."

It is to be noticed also that in neither of the above mentioned decisions was emphasis laid upon the fact that the deposit to secure which the assets had been pledged, was made by a public agency. In other words, no distinction was made between public and private deposits.

We realize that this decision is at variance with the case of Texas and Pacific Railway Company v. Pottoroff, 291 U. S. 245. There, however, the Court construed the right of a National Bank, organized under federal law, to pledge a portion of its assets. While the decision constitutes per-

suasive authority against the view which we have taken, we cannot help feeling that we should be guided by the direct holding of our own Court.

SUBJECT: BANKS; LIMITATIONS ON LOANS, C. S. 220-(d)

16 May, 1938.

I received your letter of April 22, attaching a letter from Mr. Edwin Pate under date of April 21, with copy of a resolution adopted by his Bank in January, 1938.

Under this resolution, the Bank set aside the amount of \$5400.00 from existing undivided profits to create a fund called "Reserve for Dividends Payable in Common Stock." It also provided that the amount set aside, and any additions thereto, could be used for no purpose other than to increase the common capital, without approval of the State banking authority and the Federal Deposit Insurance Corporation. Mr. Pate seems to be of the opinion that this brought this fund within the purpose and meaning of permanent surplus or unimpaired capital of the Bank. At the present time the fund is neither capital nor surplus of the Bank, but is a fund set up which is intended to be at some time used to issue stock dividends, thereby increasing the common capital stock outstanding. Until this has occurred, however, I am afraid it does not fall within the language of C. S. 220(d), fixing the basis against which loans may be made as rated upon unimpaired capital and permanent surplus.

OPINIONS TO THE DIVISION OF PURCHASE AND CONTRACT

SUBJECT: ROBINSON-PATMAN ACT

22 October, 1936.

You have in personal conference today inquired as to the application of the Robinson-Patman Act to a transaction which you have described as follows:

Brick manufacturers in North Carolina are considering making to you as purchasing agent of North Carolina, a price upon brick. The brick under consideration are manufactured in North Carolina and will be used by you in North Carolina and will not be shipped across any State line, but the transaction will be confined entirely to the State in all of its aspects.

In my opinion, and you are so advised, the Robinson-Patman Act has no application whatever to transactions which are wholly within the State. In order for the Robinson-Patman Act to have any application to you as the purchaser, or to the brick manufacturer as the seller, it is necessary that the transaction should involve interstate commerce. The transaction which you have described is intrastate commerce and, therefore, the Robinson-Patman Act has no application.

It is my further opinion that the buyer and seller in all transactions, whether interstate or intrastate, are entitled to make reasonable classifications as to the character of the function or use of property which is purchased. The seller, under the Robinson-Patman Act, would be entitled to recognize the difference in selling existing in sales to a wholesale merchant as compared with a retail merchant, or a contractor as compared with a builder. By the same token, the differential due to the function of the State Governmental Agency would be entitled to its proper classification. The only requirement is that the function and differential must be based upon real considerations and differences properly attributable thereto. The seller would be justified in making prices to State or Governmental Agencies provided they are prepared to make similar prices to other purchases by States or Governmental Agencies. This would not make it necessary for the seller to make the same prices to builders or other purchasers in other categories.

SUBJECT: SOCIAL SECURITY TAX

20 April, 1937.

Under date of April 3, 1937, with reference to the above subject, I wrote you as follows:

"I have your letter of March 26, which I have carefully noted. The tax imposed upon employers under the Federal Social Security Act or the tax imposed under any State law enacted in pursuance thereto is not such a tax as would entitle the taxpayer to add the tax to the contract price for coal which had been sold to the State, unless the contract entered into between the State and such person had expressly provided that any tax increases might be added to the cost price. While you were in the office, I

examined some of the contracts. I do not find in any of them any clause which, in my opinion, authorized or permitted the seller to add this tax to the cost of the merchandise sold to the State.

"The Federal Government has no power to levy taxes which could be imposed upon the State of North Carolina or any of its subdivisions. Excise taxes levied upon specific items of merchandise by the Federal Revenue Act are not collectible from sales made to the State or its subdivisions. I do not think, as a matter of policy, your division could afford to agree to pay any federal taxes imposed upon persons who make sales to the State and I do not think that the agreements with these sellers contain any provision which justify this charge."

You have called my attention to letters from some firms with which you had contracts for the purchase of coal, in which letters contention is made that these companies had a right to add the so-called social security tax item by virtue of a provision in the contracts. This provision, which is similar in several of the contracts, provides as follows:

"The purchase price of the coal specified herein is based in part upon the present wage scales in effect with mine employees and any increases or decreases in the cost of production of the coal shipped hereunder, caused by changes in such wage scales or working conditions, or the imposition by State or Federal statutes of a direct tax on coal or the mining or sale thereof, or subsequent changes in the rate of such tax, shall correspondingly increase or decrease said price of coal on any tonnage thereafter shipped hereunder and affected thereby, and said purchase price shall be subject, also, to any general increase in cost that may result from Federal or State legislation or action by Federal or State authority affecting in whole or in part, any components in the cost of coal under this contract."

The Federal Social Security Act was approved August 14, 1935. All of these contracts were made subsequent to the enactment of this federal legislation, and being made subsequent to the law which imposed the tax, no reasonable basis exists for any contention on the part of these firms for increasing the price by reason of this legislation. The law was in effect at the time the contracts were entered into and, therefore, it cannot be claimed that there was any general increase in the costs resulting from Federal or State legislation enacted subsequent to the date of the contract.

SUBJECT: PURCHASE AND CONTRACT; COAL NEEDS; AUTHORITY TO MAKE AGREEMENTS BEFORE BEGINNING OF BIENNIUM

4 May, 1937.

In your letter of May 3rd you inquire whether or not the Division of Purchase and Contract may now buy coal for use in the next year beginning July 1st provided actual payment is not to be made until after the beginning of the fiscal year.

Appropriations under the General Appropriations Act are, of course, not available until the beginning of the first fiscal year of the biennium. This does not mean, in my opinion, that no contracts or commitments may be made at the present time involving payment out of these appropriations provided payment is not required until after the beginning of the fiscal

year. It is more a question of availability than of present authority to make the contract.

As a matter of fact, the needs of the State in many directions, and certainly as to the purchase of coal, are continuing in their nature and the administration should certainly be adequate in its authority to prevent those inconveniences and to avoid those penalties which necessarily come about through a want of provident attention in apt time to future necessities which might be caused by frequent interruptions of authority.

Answering your question directly, in my opinion you now have the authority to contract for coal to be used during the biennium for delivery at any time but not to be paid for until after the beginning of the fiscal year.

SUBJECT: POWERS AND AUTHORITY OF THE DIVISION OF PURCHASE AND CONTRACT

26 January, 1938.

In conference you have submitted to me seven questions, which I will endeavor to answer.

1. Does the Division have authority to reject a requisition from a State agency on the grounds that the requisition is for supplies of higher quality than our standard specifications? (see Sec. 2b, Chap. 261, P. L. 1931).

The section referred to empowers the Department to establish and enforce standard specifications which shall apply to all supplies, materials, and equipment purchased or to be purchased for the use of the State Government or any of its departments, institutions, or agencies. You would, therefore, have the right to reject requisition from a State agency upon the grounds that the requisition is for supplies of a higher quality than your standard specifications. This answers your question but does not mean that you would not be authorized as in your discretion you saw fit to vary the specifications as to quality in cases found to be proper.

2. What would be the nature of an "appropriate action" indicated in Sec. 9, Chap. 261, P. L. 1931, against an executive officer who purchases supplies without proper authorization?

Appropriate action, as used in this section, has reference to the jurisdiction of the court to entertain the suit authorized thereby. This is a legal question which would be determined at the time of bringing the suit by your counsel.

3. Are cooperative or semi-independent units of a State agency—The Carolina Inn and Coop. Store of Chapel Hill, for example—in any manner exempt from the provisions of Chap. 261, P. L. 1931?

In making purchases of supplies and materials for re-sale by funds which are not provided in the appropriation, the Carolina Inn or Coop. Store, for example, such purchases would not come under your jurisdiction. In purchasing books or food which are intended to be re-sold, the purchases are not subject to the provisions of the Act. In purchases of materials such as coal which, in part, provide for power consumed by the University and, in part, sold to the public, in my opinion the provisions of the Act would apply. As to electrical supplies sold to the public by the service division of the University or similar institutions, the purchases would not be subject to your control.

4. Are purchases made from donations to any State agency for either general or specific purposes subject to Chap. 261, P. L. 1931?

If the donations are to the general fund of the agency, the purchases made therefrom are subject to the Act. If the donation is for the specific purpose of purchasing certain articles, the conditions imposed by the donor would control. If a donation is made for an object, but the selection and purchase of the object is not controlled by the terms of the gift, the fund alone being provided to make it, the purchase would be subject to your jurisdiction.

5. Are funds obtained from local sources for the operation of public school units in any manner exempt from the provisions of Chap. 261, P. L. 1931?

Under Section 25, Chapter 562, Public Laws of 1933, all purchases made for the operation of the public schools, either from State or from local funds, are made subject to your department. By Chapter 394, Public Laws of 1937, Section 25, and by Chapter 455, Public Laws of 1933, Section 25, it is provided that all purchases for school purposes shall be subject to the control of your department.

6. Would the purchase of all items which could be classed as repairs or permanent improvements and which exceeded \$1000 in cost be exempt from the provisions of Chap. 261, P. L. 1931? (See Chap. 291, P. L. 1931)

Chapter 291, Public Laws of 1931, deals with the competitive bidding on contracts for buildings and repairs or permanent improvements at the several institutions of the State requiring advertisement in contracts costing more than \$1000, except in cases of emergency. This has reference only to construction contracts or repair contracts, and contracts made thereunder are not subject to your jurisdiction, or materials purchased under such contracts by the contractor.

Border line cases may be presented in which the contract may be in reality a sale of supplies requiring installation. If the installation is a minor feature and not a substantial part of the sale, then it is my opinion it should be treated as a sale of materials or supplies and not as a construction contract coming under Chapter 291. The foregoing answers sub-question (a) under your question No. 6.

7. Excepting members of this Division, is there any legal reason why members of State agencies should not purchase supplies under State contract with personal funds for private use?

In my opinion, no purchases should be allowed for personal use out of private funds under contracts made by your department, either by members of your Division or by anyone else.

OPINIONS TO STATE SCHOOL COMMISSION

SUBJECT: EXPENDITURES; SCHOOL BUSES; REPLACEMENT

4 May, 1937.

Construing together the General Appropriations Act, the School Machinery Act and House Bill No. 79, appropriating \$600,000.00 for the purpose of purchasing busses, all acts of the General Assembly of 1937, I regret that I am unable to advise that the Education Commission may expend more than \$600,000.00 for replacement school busses for 1937-1938 by way of supplement out of the appropriation for that year.

Realizing that the condition of emergency exists and in view of the fact that proposals have been made for replacement school busses involving a greater amount and the Board of Awards is having its meeting today, I beg to say that I have conferred with the Governor about this situation, and there will be available to your Commission for use in connection with this bidding and award out of the Contingency and Emergency Fund the balance necessary to pay for the replacement busses under the proposals now made, which, as I understand it, will involve the allocation of a sum out of the Contingency and Emergency Fund of \$169,000.00 in round numbers. This would be upon a commitment by the Commission to replace that sum out of the allocation for replacement busses made by your Commission for the year 1938-1939, as to which the restrictions made in House Bill No. 79 does not apply.

I deem it necessary for you to have this information for your action today.

SUBJECT: EDUCATION; APPOINTMENT OF SCHOOL COMMITTEE

26 June, 1937.

In your letter of June 25th you make the following inquiry:

"Can the county board of education, on its own motion, drop one or more members of the district committee and appoint others to take their place?"

This inquiry is predicated upon the action of a County Board of Education expressed in the following resolution:

"For the best interest of the school, Mr. Frank R. Stone and Mr. A. C. Simmons were dropped from the committee and Mr. W. E. Collins and Mr. Fletcher Smith were appointed in their stead."

Committeemen of the various school districts of the State are appointed by the County Boards of Education under authority of Section 7 of the School Machinery Act, Chapter 394 Public Laws 1937, which provides, in part:

"At the first regular meeting during the month of April, one thousand nine hundred and thirty-seven, or as soon thereafter as practical and biennially thereafter, the County Boards of Education shall elect and appoint school committees for each of the several districts in their counties, consisting of not less than three nor more than five persons for each school district, *whose term of office shall be for two years.*"

A school committeeman, when so elected and appointed, is an officer with a definite term of office for two years, and he cannot be deprived of that office except for good cause, nor does he hold it at the will of the Board of Education which appointed him.

The public school law provides a method by which committeemen may be removed, upon charges justifying such removal, but this must be done in accordance with the law, with a right of hearing and of review. See C. S. 5458. The causes for which such removal may be had are laid down in this section.

Nothing else appearing except the facts outlined in your letter, the Board of Education did not have the right to remove the two members of the school committee and substitute others in their place.

SUBJECT: SCHOOL LAW; CITY ADMINISTRATIVE UNITS; INCREASE OF
TERRITORY

19 July, 1937.

You inquire whether or not the City Administrative Unit of Charlotte, which unit has voted a tax for supplemental purposes, may extend its boundaries so as to include property that has been recently obtained by the City Unit.

Section 14 of the School Machinery Act requires that before a City Administrative Unit may impose a tax for supplemental purposes there must be an election held in that unit. In our opinion, this section has the effect of preventing a unit from extending its limits and thereby saddling additional territory with a supplementary tax. However, in the situation which you have outlined to us, it can be seen that the additional territory will not be responsible for any of the tax voted upon the City Administrative Unit. For this reason, we believe that the unit does have the authority to extend its boundaries so as to include the property which you describe.

SUBJECT: INSURANCE; MUTUAL COMPANIES; PUBLIC PROPERTY

16 April, 1938.

You inquire whether or not the State School Boards and public bodies having the duty of insuring school property may do so in a mutual company, where the policies are made nonassessable.

This question was decided in the affirmative in *Fuller vs. Lockhart*, 209 N. C., 61.

In this connection, I may call your attention to the fact that up to the time of this Supreme Court decision the ruling of this Department was against the authority to take out such insurance in a mutual company. The question had been frequently agitated and I advised that the interested parties bring a test case, which was done, with the result mentioned.

I know of no legal impediment in the way of taking insurance in mutual companies, either on the part of the State, a municipality, or a school board.

OPINIONS TO COMMISSIONER OF VETERANS LOAN FUNDS

SUBJECT: WORLD WAR VETERANS LOAN FUND; SEPARATE ACCOUNTS FOR
BONDS ISSUED UNDER THE 1929 ACT

25 March, 1937.

I received your letter of March 19, in which you suggest the desirability of combining, in the interest of economy, an account kept by you, known as Account No. 1, which involves the funds derived from the sale of \$2,000,000.00 in bonds, authorized under Chapter 155, Public Laws of 1925, and Account No. 2, which involves the funds derived from the sale of \$500,000.00 in bonds authorized under Chapter 298, Public Laws of 1929.

Under Chapter 155, Public Laws of 1925, in Section 11, it is provided as follows:

"The bonds until sold shall be deposited with the State Treasurer and when sold the proceeds of the bonds shall be paid to the State Treasurer and kept in a separate fund, to be designated as the 'World War Veterans Loan Fund'."

In Section 12, it is provided that "all payments on loans, whether principal or interest, shall be made to the State Treasurer, and shall be deposited and held in a separate fund as above designated and applied to the payment of said bonds when and as they become due * * *."

In the 1929 Act, Section 12, it is provided that the proceeds of the bonds authorized shall be loaned for the same purposes and under the same conditions, provisions and limitations, as bonds authorized by Chapter 155, Public Laws of 1925, and the proceeds shall be disbursed in the same manner and subject to the same penalties as contained in Sections 8, 9 and 10, of the Supplemental World War Veterans Act. In Section 5, it is provided "that the proceeds of said bonds, including any premium received thereon and of the bond anticipation notes, herein authorized, shall be placed by the Treasurer in a separate fund, as provided by Section 11, Chapter 155, Public Laws of 1925." In Section 14, it is provided "that all payments on loans, whether principal or interest, shall be made, deposited and applied, as directed in Section 12, Chapter 155, Public Laws of 1925, and subject to the provisos contained in said Section * * * ." In view of the quoted provisions of the two acts, I am of the opinion that the two accounts, No. 1 and No. 2, should be kept separate as has been done heretofore. The provisions of both acts are such as to contemplate that loans shall be made from the funds derived from the sale of the bonds authorized in such a way as to retire the bonds at maturity. The loans themselves are directly committed to payment of the bonds as they mature. This affords a substantial reason apart from any bookkeeping methods, for keeping the fund separate and distinct. While the bonds are general obligations of the State, they are additionally protected by the commitments contained in the Act. The fact that the bonds are issued under different dates and matured at different times would also be important as the determining factor as to the length of time for which loans could be made. From the language of the Act as well as the reasoning involved, I do not think it would be proper to combine the two accounts, although keeping them separate does involve additional expense and bookkeeping.

OPINIONS TO COMMISSION FOR THE BLIND

SUBJECT: STATE COMMISSION FOR THE BLIND; HOLDING REAL ESTATE

19 August, 1936.

An examination of the Act creating the North Carolina Commission for the Blind, Chapter 53 Public Laws of 1935, discloses that there is no direct provision upon the subject of holding real estate by the Commission. However, Section 5 of that Chapter does empower the Commission to "establish one or more training schools and workshops for employment of suitable blind persons." I am convinced that a direct conveyance to the Commission for the Blind of real estate essential to the accomplishment of this purpose will be sustained by the courts.

However, to free the matter from all doubt, I suggest that the conveyance be made to the State of North Carolina *for the exclusive use of the North Carolina State Commission for the Blind*. This will make the transaction unassailable.

SUBJECT: FREE LICENSE; BLIND PERSONS

1 March, 1937.

I have your letter of February 25. In my opinion, a blind person would not be entitled to secure a free license to operate a motor vehicle on the highways of this State under the provisions of Chapter 53, Public Laws of 1933. The provisions of this act are such as to indicate that the legislative intent did not go beyond privilege licenses under Schedule "B" of the Revenue Act. In my opinion, the provisions of the Act should not be extended by its necessary implication.

SUBJECT: PAYMENT OF BENEFITS TO MINORS, ETC.

9 August, 1937.

You have submitted to me a letter to you from Miss Lavinia Keys, Regional Representative, Bureau of Public Assistance, Social Security Board, in which she suggests that you secure an opinion from this office as to payments to blind children under sixteen living with relatives, mentally deficient blind children living with parents, and blind children placed in foster homes without legal commitment.

You have also personally asked my opinion as to payments to blind people who are mentally deficient, but as to whom there has been no adjudication of incompetency.

In each case of blind children, you should make the benefit payment checks payable in the name of the children to whom the awards are made. The payments to such children and the endorsements of the checks by them, would, in my opinion, be a sufficient acquittance of any obligation for making these payments. Unless there has been an adjudication of insanity as to a child or as to an adult, you would be justified in assuming that the person was not incompetent and the payments should be made directly to such person.

As to minor children, the laws protecting the estates and properties of minors should be considered as "a shield" and not as "a sword." The awards made to them are benefit payments in the nature of gifts made from available funds, and the law does not prescribe the manner in which such pay-

ments can be made. In all cases, however, in which awards are made to minors or to persons as to whose mentality there may exist a doubt, it would be advisable that you request the case workers and welfare agencies to follow these cases closely to see that the benefit payments are being actually utilized for the purposes intended. In the event it appeared that such was not the case, you could then work out some plan by which the expenditure of the funds could be supervised.

SUBJECT: CHAPTER 124 PUBLIC LAWS OF 1937; APPROPRIATION COST OF
EXAMINATION OF APPLICANT'S EYES

9 August, 1937.

Receipt is acknowledged of your letter of August 9th in which you inquire as to whether or not it would be legal for you to pay for examinations of applicants by ophthalmologists out of State funds for aid to the needy blind. You state that you find it is impossible in many cases for the needy blind to secure or pay for such examinations.

In applications made under the Act it is required that it be accompanied by a certificate signed by a reputable physician actually engaged in treatment of diseases of the eye. The application may be made by the needy blind person or may be made by your Commission. The filing of this certificate is an essential and important provision of the law.

Under Section 14, an appropriation is made by the General Assembly which provides that the amount so appropriated shall be used exclusively for payments to needy blind persons and in carrying out the purposes of this act. Under this appropriation the part of the benefit payments contributed by the State are paid and in addition thereto the necessary costs of State administration, the appropriation including both benefit payments and administrative costs without any segregation of the amounts to be paid for each purpose. In my opinion, the examinations of the applicants is a necessary and essential feature of the administration of the act, and if it appears impracticable to have these examinations made and provided for by the needy applicant, you are authorized to treat the costs of examinations of applicants and furnishing of the required certificates as a part of the administrative costs. If no allocation from the appropriation has been made for this purpose, you should request the Budget Bureau to provide for the same.

In your regulations, approved by this department, Section 11 on page 7 provides that the applicant shall make arrangements for securing this examination when possible, but in case it is impossible for the applicant to arrange for such examination your Commission will arrange to send an ophthalmologist to make the examination or provide transportation to the nearest ophthalmologist. The costs incident to carrying out this regulation should properly be considered as a part of the administrative costs of your Commission in carrying out the purposes of the Act.

SUBJECT: AID TO THE BLIND; APPROPRIATION FROM GENERAL FUND BY
COUNTY

8 December, 1937.

I have your letter of December 7th in which you ask as to whether or not Guilford County would have the right to transfer from its General County

Fund an additional amount to take care of the county's part of Aid to Needy Blind. In this instance, it is found that the original quota set for the county has been exceeded and that additional funds are required for this purpose.

In my opinion, the county is fully authorized to transfer from its General Fund any available sums for this purpose.

SUBJECT: PURCHASE OF SUPPLIES BY STATE INSTITUTIONS FROM WORKSHOPS
FOR THE BLIND

21 February, 1938.

You submit to us a proposed Act which would require the purchasing authorities of State Institutions and the purchasing authorities of the political sub-divisions of the State to purchase mattresses and brooms from workshops which have been established by your Commission, where blind wards of the State make, among other articles, brooms and mattresses.

We see no reason why such an Act would be constitutionally invalid. An analogous situation exists at the State Prison today. The General Assembly, by enacting Chapter 211, Public Laws of 1929, and Chapter 165, Public Laws of 1935, directs the Division of Purchase and Contract, or such other authority as may exercise the right, to purchase shoes and automobile license tags, to contract with the State Highway and Public Works Commission for the license tags for the State and shoe requirements for the inmates of the various institutions.

You suggest that we draw a Bill which you could submit to the next General Assembly, which would require the various State Institutions, and political subdivisions of the State, to purchase their brooms and mattresses from your workshops for the blind, and we attach herewith a proposed Bill for your consideration.

SUBJECT: AID TO NEEDY BLIND; AGREEMENTS WITH OTHER STATES

11 April, 1938.

Receipt is acknowledged of your letter of April 8th. Under the Aid to the Blind Act, Section 4 (3), to be eligible for assistance a person must have resided in the State of North Carolina for five years during the nine years immediately preceding the date of such application, and have been a resident of this State for one year immediately preceding the application. Of course, we could not undertake any arrangement with any other State to award compensation in the future in any particular case, as it would be impossible to prejudge the status of the person in advance of the time that the case arose and the application was filed. Also, no person could be awarded the benefits of the Act who, at the time of the application, was not eligible from a residence standpoint as provided in the above referred to subsection.

In case an eligible person who had been awarded compensation should leave the State and take up his residence in some other State, it has been our opinion that from the time of leaving this State and taking residence in another State, the eligibility of such person would terminate for payments under the North Carolina Law.

OPINIONS TO GREATER UNIVERSITY

SUBJECT: LOANS MADE BY THE DELAWARE STUDENT LOAN FUND

6 November, 1936.

In reply to your recent letter, I will say that in my opinion your questions should be answered as follows:

1. Any note in North Carolina is considered a legal document, even if not signed by anyone in addition to whom the loan was made. C. S. 3166.

2. Payment of the loan is not compulsory when the one receiving the loan is not twenty-one years of age, even though he signed the agreement which was attached, which states that he would make a new note if he became of age before it was due. Coker v. Va. Bank, 208 N. C., 41.

3. If the note runs more than three years, the person making the note could plead the statute of limitations, unless the note was sealed. C. S. 441 (1).

SUBJECT: UNIVERSITY OF NORTH CAROLINA, STATE COLLEGE OF AGRICULTURE AND ENGINEERING; AUTHORITY OF TRUSTEES

18 December, 1936.

You have submitted to me a copy of the minutes of the Executive Committee of University Trustees, June 4, 1934, relating to the Athletic Council of State College. With it you submit an excerpt from Rule 13 of the By-laws of the Southern Conference. You ask whether or not the Athletic Council at State College shall be selected under the rules established by the Trustees through the Executive Committee on June 4, 1934, or under the By-laws of the Southern Conference.

The trustees of the University have complete authority over the personnel of the University and of its various branches, and, under the law, may establish rules and regulations for their selection and tenure of office. In this respect, the authority of the trustees is autonomous and cannot be interfered with or controlled by any voluntary association whatsoever.

SUBJECT: RE: KENAN UNIVERSITY ENDOWMENT FUND

24 March, 1937.

After our conference at Carolina Inn sometime ago, at which I expressed an opinion that if settlement is made in cash the Trustees of the Kenan University Endowment Fund must, under the will of Mrs. Bingham, pay over an amount sufficient to produce an annual income of \$75,000.00, based upon current interest rates, and that such interest rates were not necessarily the so-called legal rate of six per cent but, rather, that rate which would produce the required amount out of secure investments which might be made currently, a further question has come to me as to whether or not, under the terms of the will, the Trustees have an unqualified discretion in determining the amount itself which will produce the \$75,000.00 annually. This question may be clarified by putting it in a different way: Whether under the particular phrasing of the will the Trustees have the unqualified discretion of adopting such rate of interest as they see fit, bearing in mind that the rate of interest fixes the amount to be paid over under the bequest.

In my judgment, the Trustees do not have such unqualified discretion. I think there is an equity involved which the courts would enforce if necessary to effectuate the purpose of the will; because, if they do not, the object of the bequest or endowment might be defeated by arbitrary or capricious action on the part of the Trustees.

Upon reading that part of the will which relates to this bequest and trying to construe it according to the intent of the will, I do not believe it could be held that the donor intended to give such unqualified discretion to the Trustees. The main purpose of the will, to which other considerations must be brought in conformity, was to secure the University an income of \$75,000.00 a year, and not any less sum which it might be convenient for the Trustees to determine by adopting a rate of interest which was obviously not "current."

This view is strengthened when we examine the obligation of the Trustees under the will before the termination of the trust, that is, while it was still active. They are required to pay over \$75,000.00 a year without any discretion and without diminution. Assuming that the \$75,000.00 was produced by income, consisting in whole or in part of interest from interest-bearing securities, I venture to say that few of such securities carried an interest rate of six per cent. Certainly the securities suitable for reinvestment of this fund bear no such rate.

I think the Trustees might, in the exercise of sound judgment, have considerable latitude in deciding what rate of interest is current, but could not by arbitrary or capricious action adopt a rate of interest which is obviously not current; and I think this is the limit of discretion the will intended them to have.

SUBJECT: FEES CLERK SUPERIOR COURT; FUNDS PAID INTO HIS HANDS
FROM UNAPPROVED BANK DEPOSITS

8 July, 1937.

You request an opinion from this office as to fees to which Clerks of the Superior Court are entitled on funds paid into their hands representing unclaimed bank deposits for banks in liquidation by the Commissioner of Banks. Under C. S. 3903, fixing the fees of the Clerk of the Superior Court, it is in part provided as follows:

"* * * and 3% of all sums of money not exceeding \$500.00 placed in his hands by virtue of his office, except on judgments, decrees, executions, and deposits under Article 3 of Chapter 54; and upon the excess over \$500.00 of such sums, 1%."

Under this provision, in my opinion the Clerk is entitled to charge his fees against the total sum paid into his hands on the first \$500.00, 3%; and on any excess of that amount, 1%. No additional fees are allowable to the Clerk on account of making separate disbursements to claimants prior to the time that the remaining part of the fund is paid over to the University. The fees can be figured only on the total sum which is paid over to the Clerk.

SUBJECT: TAXATION; LICENSE TAXES; LIABILITY OF STATE
COLLEGE LAUNDRY

22 December, 1937.

I have received and considered your letter of December 16th relative to

the liability of the State College Laundry for the annual license fee levied under Chapter 30 of the 1937 Public Laws.

Though the college laundry is not operated for profit and makes no effort to solicit outside business, it is true that some outside work is done. Since the laundry is thus entering into competition with private cleaners to an even greater degree than is the case when its operations are restricted to cleaning for the student body and faculty, the laundry should pay the fee. There is no exemption in the Act, and this is not a property tax, from which the laundry might possibly be immune under the constitutional exemption of property held by the University of North Carolina. If under the circumstances the license were not made to apply to the State College Laundry, it would be discriminatory as imposing a burden upon other cleaners which would not be shared by their competitor, the State College Laundry.

SUBJECT: ESCHEATS; FRED E. SMITH, ADMINISTRATOR OF GEORGE DAY ESTATE, v. UNIVERSITY OF NORTH CAROLINA, ET AL.

30 December, 1937.

1. Real estate in the State of Tennessee belonging to George Day, who died a resident of North Carolina without heirs or next of kin, does not escheat to the State of North Carolina and, by reason thereof, go to the University of North Carolina.

Both in this State and in Tennessee, the escheat of lands is to the sovereignty or state in which the lands lie. The North Carolina law upon the question of escheats does not recognize the possibility of such escheat of lands outside the State.

Moreover, in Tennessee the law (Code of 1932, section 7751) provides for escheat of such lands to that State, for the use of the common school fund. The Tennessee statute is somewhat inartificially drawn but is, I think, sufficient.

It is of interest here to note that formerly the question of escheats in Tennessee was considered in its relation to the concession of that territory to the United States Government, and it was then decided that lands of persons dying without heirs would escheat to Tennessee. *Williams v. Wilson*, 8 Tenn. 248. In this State the latest authority on escheats is *University v. High Point*, 203 N. C., 562, and I am sure the principles set out in that case would not cover escheat of land outside the State.

2. It seems clear to me that the provision of C. S. 5785, to the effect that where personal property had remained in the hands of an administrator or representative for five years after qualification should be turned over to the University of North Carolina, does not apply to this particular case, where it is known that there are no distributees to take under the statute, and the case of *Carter v. Smith*, 209 N. C., 788, as suggested by Mr. Williams, unquestionably applies; therefore, it will not be necessary to wait the five years in this case in order to have the funds or personal property of the estate turned over to the University.

OPINIONS TO STATE HOSPITALS AND INSTITUTIONS

SUBJECT: INEBRIATES; CHARGES BY STATE HOSPITAL FOR CARE
AND TREATMENT

29 July, 1936.

The costs and expenses for detention, treatment and cure of inebriates is prescribed in Consolidated Statutes 2304 (d). This statute provides that after it is found by the Clerk that an inebriate is a fit subject for care and treatment, that he shall go further and inquire as to whether said inebriate is indigent or not in such way that he has not in his own right sufficient estate or property to bear the cost and expense of such treatment.

It further provides that in the event that such inebriate is indigent and unable to bear his own expense, that such expense shall be borne and paid by the county from which the inebriate is admitted. It is further provided that in the event the county has to pay this expense, that a charge shall only be made for board and clothing. This, of course, leaves it to your staff or your board of trustees to fix such actual costs in cases where the expense is borne by the county of the residence of the inebriate.

If you find that due to the fact that it costs more to board and clothe patients in the inebriate ward, of course the charge could be increased. In any event, we think that the counties should be charged only the actual expenses for board and clothing. This, of course, necessarily must be determined by you and your staff.

SUBJECT: REFORMATORIES; STATE INDUSTRIAL FARM COLONY FOR
WOMEN; ELIGIBILITY

28 September, 1936.

Under C. S. 7343 (k), only women misdemeanants may be lawfully committed to the Industrial Farm Colony, and this institution has no legal right to receive any person who has pleaded to or has been convicted of a felony. There is no room here for any play upon the word "misdemeanors" used in the statute, although now some misdemeanors are punishable by imprisonment in the State's Prison and by this definition become felonies, for the simple reason that murder is a felony under any definition.

SUBJECT: STATE INSTITUTIONS; INEBRIATES; COMMITMENT TO
STATE HOSPITAL

16 October, 1936.

We find nothing in the statute which would require ten days' notice of a hearing before the Clerk in a petition for the submission of a patient to the State Hospital as an inebriate. We are of the opinion that a reasonable time would be sufficient. We hesitate to say just what a reasonable time would be; however, there is no requirement in the statute for a ten days' notice.

With regard to patients who have submitted themselves for treatment,

this office is of the opinion that a patient after he has been detained 30 days may apply for his release and discharge by giving ten days' notice in writing to the Superintendent; however, this provision in the statute is modified by the last provision in C. S. 2304 (e), which is self-explanatory and is as follows: "Provided, said physician or physicians are satisfied that said inebriate has sufficiently recovered to return to his home and not become a menace or charge to society."

We interpret this to mean that you would not be required to release the man simply because he had given the proper ten days' notice to you if, in the opinion of you and your staff, he was a fit subject for further care and treatment.

SUBJECT: COMMITMENTS TO THE FARM COLONY FOR WOMEN

4 January, 1937.

I have your letter of December 19, referring to a commitment from the Mayor's Court of Henderson, North Carolina. In response to your inquiry, I beg to advise that in my opinion the commitments can be properly made by the Mayor's Court and other courts inferior to the Superior Court. C. S. 7343(k), relating to commitments, provides that women guilty of specified crimes "may be committed by any court of competent jurisdiction to said institution, . . ." This Section further provides that "commitment to said institution shall be made within one week after sentence is imposed by the Sheriff, when sentenced by the Superior Court, and by police officer when sentence is imposed by any city, town or inferior court." This Section directly recognizes the right of the inferior courts to commit.

No form of commitment is prescribed by the statute and, therefore, you would be compelled to recognize any proper commitments in whatever form they were made. You inquire as to whether or not the commitment is legal. It is provided in C. S. 7343(k) that the court imposing the sentence to the colony shall fix no definite term except within specified limits. In other words, makes an indeterminate sentence. It is erroneous for the judge of the municipal court to sentence the defendant for the definite period of six months. It has been held, however, that in spite of the fact that a sentence is erroneous, it is not void, the prisoner still being entitled to the benefit of the indeterminate sentence, 16 Corpus Juris and cases therein cited.

I am also of the opinion that the sentence is erroneous in requiring the payment of costs as the condition to the discharge. Your institution is a correctional institution rather than a penal one, not being a penal institution the requirement for payment of costs is inappropriate to this commitment.

I would suggest that you send a copy of the letter which is enclosed to the mayor who imposed the sentence for his consideration as to whether or not the judgment should be changed and the commitment reformed in accordance with the provisions of the statute.

SUBJECT: STATE INSTITUTIONS; OUT OF STATE BOYS COMMITTED TO
EASTERN CAROLINA TRAINING SCHOOL

27 August, 1937.

We have your letter of August 23, in which you inquire whether boys from States other than North Carolina can be sent to Eastern Carolina Training School.

It appears that the intention of the Legislature, in enacting the statute which created the Eastern Carolina Training School, was that this was to be a correctional, rather than a penal, institution. From C. S. 7362(c), it would also appear that only boys "of the State" were to be committed to the Institution. However, it is apparent that the Judge is his discretion sent a boy who was from Massachusetts to the School, and under the section above cited, it would seem that a Judge may make such commitment if he sees fit. Such procedure may have been wrong, but since the boy is at the School, there will be no problem unless some question was made in the application to look behind the Judge's order. It is probably best that the boy remain at your Institution rather than be sent to the State Penitentiary.

SUBJECT: MAXIMUM HOURS LAW; APPLICABILITY TO EMPLOYEES OF
STATE INSTITUTIONS

9 September, 1937.

We have your letter of September 8th in which you inquire as to whether the provisions of the new labor laws restricting the number of hours per week and also the number of hours per day, would apply to employees of your institution. This will advise you that in Section 1, Chapter 409, Public Laws of 1937, one of the exemptions under the proviso is as follows:

"Provided, nothing in this Act shall apply to State or municipal corporations or their employees."

Therefore, it is apparent that the terms of the Act do not apply to employees of your institution.

SUBJECT: STATE HOSPITALS AND INSTITUTIONS; EMERGENCIES
NECESSITATING OPERATIONS; PROCEDURE

9 November, 1937.

You state that emergency cases arise in your Hospital where it is necessary, in order to save the life of a patient therein, that an operation be performed in order to save such life, but that apparently, under the provisions of C. S. 7221 and 7222, no such operation can be performed without the consent and approval of at least one representative of the medical staff of the several charitable and penal institutions of the State, and one representative from the State Board of Health. Also, that no such operation shall be performed without the affirmation by the Governor and Secretary to the State Board of Health.

Nothing is mentioned in this statute about emergency operations; that is to say, operations which should be immediately performed in order to

save human life. We have been unable to find any cases passed on by the North Carolina Supreme Court on this subject; however, in other jurisdictions this question has been raised in the courts. In *Pratt vs. Davis*, (1906) 224 Ill. 300, 76 A. L. R., 569, we find the following:

"It was stated that when a patient consents to an operation and unexpected conditions develop or are discovered in the course of the operation, or when a surgeon is called in an emergency and some immediate action is found necessary for the preservation of the life or the health of the patient, and it is impractical to obtain the consent of the patient or anyone authorized to speak for him, the surgeon may and should perform such operation as good surgery demands, without such consent. . . . That perhaps the various cases which might be supposed of sudden and critical emergency in which the surgeon would be held justified in a major or capital operation without expressed consent of the patient might be referred to the same principle of an implied license."

In *Lamar vs. Pike County*, 30 N. E. 912, 44 A. L. R. 1288, a county was held liable for medical services rendered by a physician summoned by the jailer to attend a prisoner in an emergency not admitting of the four hours' delay necessary to procure the attendance of the Secretary of the Board of Health, who resided at a considerable distance from the jail, notwithstanding that the statute provided that the Secretary of the Board of Health should render such medical services as were required by the prisoner.

The Court said:

"In the case before us, it was the duty of Smith, the jailer in charge of the prisoner, and acting for the Sheriff, to summon a competent physician, under the existing emergency; to treat the prisoner and thereby save his life, if such could be done. It would have been inexcusable neglect on the part of the jailer to have waited four hours to have summoned the Secretary of the Board of Health, 12 miles distant, when the necessary medical aid could be obtained speedily and near at hand, and was essential to save the life of the prisoner."

This case, of course, was a suit brought by a doctor to collect fees for medical services after he had been called in to perform an emergency operation on a prisoner. The court held the county liable for the fees so charged.

This same conclusion was reached in the case where a pauper, whose back was broken when hit by an automobile, prompt attention being needed to save his life, and there being no time to notify the Town Commissioners. (*Sweet Clinic vs. Lewis Company* (1929), 154 Wash. 416, 93 A. L. R. 905. The court said in this case:

"If such services were rendered without authority from any county official authorized by law to bind the county, it must, of course, appear that an emergency existed which rendered it impossible to await such authorization, and that the situation was promptly reported to the proper county official of the proper county."

As stated above, our statute makes no reference to emergency operations and we cannot think that the Legislature intended, by the enactment of the statutes above referred to, to impose a death penalty upon inmates of any of our State Institutions by requiring a conference between representa-

tives of the medical staff of the several institutions of the State, when the delay caused by the holding of such a conference might, in numerous instances, result in the death of such inmate. It is conceivable, and, no doubt, a situation has arisen many times in your Hospital where it is entirely impractical and impossible for your staff to summon a member of the medical staff of each of the several State Institutions, a member of the staff of the State Board of Health, and in addition thereto, secure the affirmation of the Governor of the State and the Secretary of the State Board of Health before you proceed to perform an operation which, in your best professional judgment, may save the life of an inmate of your Institution. We think that where an emergency exists, and, in your opinion, an operation is necessary to save human life, that you would be justified in proceeding to perform such operation.

However, we must say that an emergency must exist such as contemplated in the opinions of the courts above cited; otherwise, the provisions of C. S. 7221 and 7222 should be complied with.

SUBJECT: COMMITMENT TO STATE HOSPITAL; CRIMINAL INSANE; C. S. 6238

10 November, 1937.

From information received from the Clerk's Office here in Wake County, the above patient was received upon affidavit and certificate of Dr. George Coleman, Prison Surgeon at the State's Prison. The judgment in this case in the Wake County Criminal Court shows that this man was sentenced to two years at State Prison for crime of larceny and receiving. The Judgment does not show that he was sentenced by the court to the Criminal Insane Department of the State Hospital.

No doubt this man was sent to your Hospital under the provisions of C. S. 6238, which provides that all convicts becoming insane after commitment to the State's Prison, and the fact being certified, as now required by law in the case of other insane persons, shall be committed to the State Hospital. However, we find this provision in this statute.

"In case of the expiration of the sentence of any convict, insane person, while such person is confined to the said Hospital, such person shall be kept until restored to his right mind."

This prisoner's sentence, not having expired, and your staff being of the opinion that he has been restored to his right mind, we think you have authority to return this man to the State's Prison in order that he may serve the remainder of the sentence there.

SUBJECT: STATE INSTITUTION FOR BLIND; CLASSIFICATION; EDUCATIONAL

10 June, 1938.

I have your letter of June 9, in which you ask my opinion as to whether the State School for the Blind and Deaf should be classified as an educational institution, as you are now listed, or whether you should be transferred for classification as a charitable, penal and correctional institution.

It is my opinion, after examination of the statute, C. S. 5872, et seq., that your institution was set up primarily as an educational institution for

the benefit of children between the ages of seven and twenty-one years (C. S. 5876). The institution is called "State School for the Blind and Deaf." C. S. 5872 begins with the statement, "The institution for the education of the deaf, dumb and the blind * *." Section 5879 authorizes the school to confer degrees or marks of literary distinction. Throughout the section the terms employed are those used in connection with educational institutions.

In various appropriations made by the General Assembly, the amounts appropriated for your institution are under the classification of educational institutions. The sections of the Consolidated Statutes referred to fall under the chapter dealing with educational institutions of the State. It is my understanding that the classification as an educational institution is in accordance with legislative recognition and administrative practice.

While the institution in part partakes of the nature of a charitable institution or asylum for the type of children admitted to it, it seems to me that its principal purpose is that of an educational institution rather than an asylum.

OPINIONS TO STATE AND COUNTY A. B. C. BOARDS

SUBJECT: INTOXICATING LIQUORS; SALE IN QUANTITY LOTS

3 October, 1936.

You state that you have been requested by a manufacturer of ice cream to furnish sherry wine in five or ten gallon quantities to be used in manufacturing ice cream. You inquire if you can make sales in quantities such as five or ten gallons to such people for commercial use without violating the law under which you operate.

The law under which you operate does not seem to limit the amount of whiskey which A. B. C. Stores may sell at one time in North Carolina. We would state, however, that purchasers in the quantities referred to in your letter would be liable to such other laws with regard to the possession of whiskey as are now in force in North Carolina. We call your especial attention to the case of *State v. Langley*, 209 N. C., 178.

SUBJECT: SALARIES AND FEES; POWERS OF ALCOHOLIC BOARD OF CONTROL

19 December, 1936.

Section 9, Chapter 493, Public Laws of 1935, which is the Act permitting the sale of alcoholic beverages in certain counties in North Carolina, provides that the Alcoholic Board of Control created by said Act "is authorized and empowered to employ such clerical and other assistance as may be necessary to carry out the provisions of this Act, and to stipulate the salaries to be paid, . . .".

This office is of the opinion that the County Commissioners of your County have no power to control or stipulate the salaries to be paid employees who have been hired to carry out the provisions of the Act, and we are of the opinion further that, should the Board fail or refuse to sign vouchers authorized by your Board, a mandamus would lie to compel them to do so.

This office is further of the opinion that if you had an understanding with your employees at the time they were hired that if the sale of alcoholic beverages in your County by this Board should prove successful, an increase in salary in the form of a bonus would be given them, and, in your opinion, the business has been successful, you have authority by virtue of the section above referred to, to increase their salary in this manner.

SUBJECT: COUNTY A. B. C. BOARDS; RIGHT TO SELL ALCOHOLIC BEVERAGES CONTAINING LESS THAN 24 PER CENTUM OF ALCOHOL BY WEIGHT

29 April, 1937.

I have your letter of April 28. You advise that the Wilson County A. B. C. Board has sought your advice as to their right to sell alcoholic beverages containing less than 21 per centum of alcohol by weight. You advise that, acting under the provisions of Chapter 493, Public Laws of 1935, this Board has in its possession about \$1,500.00 worth of alcoholic beverages

containing more than five per centum and less than 21 per centum of alcohol. They ask your advice as to their authority to sell at retail these beverages and their right to deal in them in the future.

Under Chapter 29, Public Laws of 1937, section 10(m), the County Boards are given the following power and duty:

"To exercise the power to buy, purchase and sell and to fix the prices at which all alcoholic beverages may be purchased from it, but nothing herein contained shall give said board the power to purchase or sell or deal in alcoholic beverages which contain less than five per centum of alcohol by weight."

Under Section 24, the following provision is made:

"That the term 'alcoholic beverages', as used in this Act, is hereby defined to be and to mean alcoholic beverages of any and all kinds which shall contain more than twenty-four per centum by volume and this Act is not intended to apply to or regulate the possession, sale, manufacture or transportation of beer, wines or ales containing a lower alcoholic content than above specified and whenever the term alcoholic beverage is used in this Act it shall be construed as defined in this section."

Construing these two sections together, and considering the Act as a whole, I reach the conclusion that the County Board is not prohibited from selling at retail alcoholic beverages which contain five per centum or more of alcohol by weight. While subsection (m) above quoted gives this authority only in a negative form, I conclude that it was the purpose and the intent of the Act to permit sales of such beverages in county stores. Under Section 24 and the other provisions of the Act, exclusive right of sale and regulation of alcoholic beverages containing 24 per centum by volume of alcohol is vested in the County Boards subject to the control, in the manner prescribed by the Act, by the State Board of Alcoholic Control. Alcoholic beverages containing between five per centum of alcohol by weight and 24 per centum by volume may be legally possessed and sold by the County Boards, and upon compliance with the provisions of Article 6, Schedule F, of the Revenue Act of 1937, may be sold by others, provided they are of the character authorized to be sold under license by others. The sale of alcoholic beverages containing more than 24 per centum by volume is regulated and controlled and confined entirely to stores set up under the provisions of the 1937 Act and prior laws. The views here expressed seem to me to harmonize the provisions of the Act and carry out the manifest purpose of the General Assembly.

You inquire further as to whether or not the Board has a right to sell certain cordials and liquors, such as vermouth, which have an alcoholic content of less than 21 per centum. I assume that those referred to have more than five per centum of alcohol by weight. If so, under the views above expressed, I am of the opinion that the Wilson County Board would have a right to purchase and sell these at retail in stores established under the law.

SUBJECT: COUNTY A. B. C. BOARDS; FUNCTION AND POWERS OF PEACE
OFFICERS APPOINTED BY

1 June, 1937.

You have submitted to me an inquiry as to the function and powers of a peace officer appointed by the County A. B. C. Board.

The right of the County Board to make the appointment is derived from the provisions of Section 10(o), as amended, which reads as follows:

"(o) To expend for law enforcement a sum not less than five per cent nor more than ten per cent of the total profits to be determined by quarterly audits and in the expenditure of said funds shall employ one or more persons to be appointed by and directly responsible to the respective county boards. The persons so appointed shall, after taking the oath prescribed by law for the peace officers, have the same powers and authorities within their respective counties as other peace officers."

You will observe that in the pamphlet printing of the amended Alcoholic Beverages Control Acts there was added to Section 10(c), erroneously, the last sentence contained in Subsection (o) which is above quoted. In sending out pamphlet copies of the laws, attention might be called to this error.

As the act provides that the persons so appointed have the same powers and authorities within their respective counties as other peace officers, it is clear that these persons would have the right to be armed and make arrests for violations of the Alcoholic Beverages Control Law. I understand this is the particular point as to which you desire to be informed.

SUBJECT: INTOXICATING LIQUORS; DISPOSITION OF LIQUORS SEIZED THAT
ARE UNLAWFULLY HELD OR TRANSPORTED

2 July, 1937.

I have your letter of July 1st in which you write as follows:

"I am in receipt of letter from County Attorney for Cleveland County, asking permission to sell some whiskey they have on hand to one of the liquor ABC stores. Please advise if this board has authority to grant this permit."

In Cleveland County, the Alcoholic Beverages Control Act of 1937 has not, as I understand, been adopted. Therefore, the Turlington Act, C. S. 3411 (a) and following, has not been repealed as to that county, except to the extent that it conflicts with the Alcoholic Beverages Control Act of 1937. Under Section 3411 (f), it is provided that the Court, upon the conviction of a person arrested for unlawful transportation of intoxicating liquor, shall order the liquor destroyed. As this law is in effect in Cleveland County, the officers should proceed in accordance with the provisions of this law. Your Board would have no authority to authorize the sale of this whiskey to any ABC County Store.

SUBJECT: ALCOHOLIC BEVERAGE CONTROL LAW; REPEAL OF PUBLIC-LOCAL
ACTS RELATING TO THE SUBJECT

7 July, 1937.

Ordinarily, a special local statute is not repealed by a general law unless such repeal is brought about by express wording of the general law, as,

for example, a direct mention of the local act in the repeal clause or a clear inference from the language of the Act itself that such repeal is intended; *Felmet v. Commissioners*, 186 N. C., 250; *State v. Johnston*, 170 N. C., 688; *Rodgers v. U. S.*, 185 U. S., 83; 36 Cyc 1090; but it is an accepted principle of interpretation that a general law will repeal a special local law relating to the same subject, when it is apparent that the legislative intent was to supersede the special local laws and establish a uniform state-wide system applicable to the subject. If it is apparent in the general law that it was the intention of the Legislature to make such general law comprehensive and exclusive with reference to the subject dealt with, then it must be interpreted as repealing the local law.

This principle has been frequently applied; *Peo v. Dalton*, 52 N. E. 1113 (N. Y.); *Peo v. Nelson*, 40 (N. E. 957 (Ill.)); *Alexander v. Baltimore*, 53 Md. 100; *T. Co. v. Port Huron*, 158 N. W. 19 (Mich.); *Commissioners v. Matthews*, 154 Atl. 359 (Pa.); *State v. Butcher*, 28 S. W. 296 (Tenn.).

Whether or not the Alcoholic Beverage Control Laws of this State operate to repeal local laws relating to the manufacture, possession, and sale of intoxicating drinks must depend upon a sound consideration of the background upon which they are to be placed, the purposes of the Acts, and the historical relation of all the laws involved.

The courts will take judicial notice of the fact that prior to the referendum on prohibition in 1908, and the prohibition legislation in force subsequent to that time, many hundreds, perhaps thousands, of local prohibition laws were in force in various parts of the State, sometimes overlapping in the territory to which they applied, forming a heterogeneous pattern inconsistent with any notion or possibility of State control. The subsequent enactment of the Turlington Act in 1923 applied prohibition to every part of the territory. The Turlington Act was a general comprehensive and exclusive Act applying to all of the territory of the State, including that covered by these numerous local acts, and must be held to have replaced them, inasmuch as they were not uniform in character, exhibited numerous differences in the character of offenses and in the punishment therefor, and did not lend themselves in any way at all to any uniform scheme of prohibition or liquor control such as was presented by the Turlington Act.

The Turlington Act inaugurated a state-wide policy with respect to the treatment of traffic in intoxicating liquors in North Carolina.

In my opinion, the Alcoholic Beverage Control Acts of 1937, Article VI, Schedule F of the Revenue Act, Chapter 49, Public Laws 1937, and other pertinent Acts of that General Assembly, and more especially the Alcoholic Beverage Control Act referred to as Chapter 49 Public Laws 1937, were meant to express and to put in force a general policy of the State with reference to the subjects of which they treat in which the police power of the State was called into action for the purpose of control of the whiskey traffic in all parts of the State and every portion of its territory. The adoption of the Alcoholic Beverage Control Act,—Chapter 49 Public Laws 1937,—by virtue of Section 25 and Section 27 thereof, automatically repeals the Turlington Act in the county adopting the law, at least to the extent provided in the Control Act so referred.

To invoke here the doctrine of the revival of special local laws upon this

subject by repeal of repealing act would have the effect of pumping life back into thousands of special statutes and revivifying them to such an extent that the purpose of the Legislature as to state-wide alcoholic beverage control would be utterly defeated.

I am, therefore, of the opinion that the Alcoholic Beverage Control Act was intended by the Legislature to be a substitute for all other methods of alcoholic beverage control and repeals that portion of the charter of the town referred to which is inconsistent with its provisions.

In this connection, also, I call your attention to the fact that the Alcoholic Beverage Control Act provides a referendum to popular vote in the counties. In these elections qualified voters do not vote merely as citizens of a town or of a county upon questions relating solely to the civil government of the county or town as a political entity or subdivision; they vote as qualified voters of a particular territory; in this instance the territory embraced in the county limits. In my judgment, when such election is carried, the Alcoholic Beverage Control Act,—Chapter 49 Public Laws 1937,—applies to all of the territory within the county limits.

The adoption of Chapter 49 Public Laws of 1937 has the effect of substituting its provisions for all the law upon this subject applicable to that territory; where such adoption is not made, the Turlington Act still applies.

SUBJECT: ALCOHOLIC BEVERAGES CONTROL ACT; ENFORCEMENT; SEIZURE OF VEHICLES, ETC., ILLEGALLY TRANSPORTING; DUTIES OF ENFORCEMENT OFFICERS APPOINTED UNDER 1937 ACT

15 September, 1937.

Under Section 10 (o) of the Alcoholic Beverages Control Act of 1937, the County Boards are given the power to employ one or more persons, to be appointed by and directly responsible to the respective County Boards. The persons so appointed shall, after taking the oath prescribed by law for peace officers, have the same powers and authorities within their respective counties as other peace officers.

Under Section 13, it is made unlawful for any person to have in his possession alcoholic beverages as defined, upon which taxes imposed by Federal or State authority have not been paid. This section further provides that, upon conviction of illegal possession, the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane, or other equipment used in the transportation, and that the procedure with respect to such articles so forfeited shall be in accordance with Section 6 of Chapter 1 of the Public Laws of 1923, and this law is re-enacted in this section of the 1937 Act.

Your inquiry is directed to the question as to whether or not the enforcement officers appointed under the authority above referred to have the power to proceed with the forfeiture and confiscation of the vehicles seized in illegally transporting alcoholic beverages. In my opinion, such enforcement officers do have this power under the provisions of the 1937 Act above referred to. Reference should be had to Section 6 of Chapter 1, Public Laws of 1923, for a complete statement of the procedure to be followed in such cases, to which I assume you have ready access.

SUBJECT: LIABILITY INSURANCE ON DELIVERY TRUCKS; A. B. C. BOARD

22 November, 1937.

I am not sure that I am clear as to your meaning when you say that an A. B. C. Board is regarded as a county unit. The county, of course, is a subdivision of the State for governmental purposes, and I do not regard the County A. B. C. Board as an agency of the county. Under the State-wide Liquor Control Act, I am of the opinion that it is rather an agency of the State, under the control of the State A. B. C. Board.

But I do not think that it is necessary to settle this question in determining whether the county has authority to take out liability insurance on the delivery trucks of the Board or whether the Board would be immune from liability without such insurance as a county agency.

In my opinion, the local A. B. C. Board is provided in the general scheme for the exercise of the police power in the control of the liquor traffic and, therefore, its members, to some extent at least, are exercising governmental functions. That being true, they would come within the rule laid down in *Hipp v. Ferrell*, 173 N. C., 167, and would not be liable as a board for injuries resulting from negligent use of the trucks, nor would they be liable as individuals unless the injury complained of resulted from an omission of some duty or commission of some act through malice or want of good faith, or of negligence amounting to bad faith.

SUBJECT: LOCATION OF STORES SET UP BY COUNTY ALCOHOLIC BEVERAGE CONTROL BOARDS; CHURCHES

10 January, 1938.

I have your letter of January 7th, having reference to the establishment of a store for the handling of alcoholic beverages at Norlina, North Carolina, to be operated by your Board. You advise that the site selected will be one hundred and five feet diagonally across the street from a church. You inquire as to whether or not there is any provision in our law which would prohibit the selection of such a site for the store.

There is nothing in the Alcoholic Beverage Control Act, Chapter 49, Public Laws of 1937, which prohibits the selection of a site for the location of a store in such a place. Under Section 10(n), prescribing the duties of the county boards, it is provided as follows: "To locate stores in its county and to provide for the management thereof * * *". There is nothing in the Act to prohibit or direct the locations of the stores in any particular places. Therefore, the location of a store with reference to the location of the church is a discretionary matter committed by the General Assembly to your Board, and you would have to determine whether or not the location of a store within the proximity of the church would be inimical or hurtful to the morals and religious sentiment of the community.

Under Section 513 of the Revenue Act of 1937, regulating the manufacture, transportation and sale of wine and beer, it is provided that no person shall dispense these beverages within fifty feet of a church building in an incorporated city or town. So, under this provision, the proposed location would not be prohibited by this Act.

SUBJECT: TAXABILITY OF INTANGIBLE PERSONAL PROPERTY OF
A. B. C. BOARD

22 January, 1938.

Heretofore this Department decided, under the old law, that tangible personal property or stock of A. B. C. Stores was subject to local taxation. Intangibles, of course, would follow the same law. This, however, was based in part on the holding of the Court in *Town of Benson v. Johnston County*, 209 N. C., 751, as it was difficult to see how the ownership of property of the character handled by A. B. C. Stores was referable to any governmental function.

However, the decision of the Court in *Weaverville v. Hobbs*, 212 N. C. 684, 194 S. E. 860 (1937), in my opinion effectively disposes of *Town of Benson v. Johnston County*.

Replying directly to your inquiry, I will say that in my opinion the intangibles of the A. B. C. Stores are not taxable under the current Revenue Act of 1937, Schedule H, but, on the contrary, are exempt in Section 701, where they are deposited in banks, such deposit being a deposit by an agency of a governmental unit.

SUBJECT: A. B. C. STORES; ELECTION DAY; CLOSURE

16 April, 1938.

In my opinion, the election in Raleigh City Administrative Unit upon the question of supplements to the public school appropriations is within the statute, which requires A. B. C. Stores to be closed on that day.

SUBJECT: 1937 LIQUOR LAW; RIGHT OF COMMON CARRIER TO TRANSPORT
LIQUOR NOT IN EXCESS OF ONE GALLON

30 April, 1938.

You state that the express companies operating in North Carolina are contending that they have the right under our law to accept the shipment of one gallon of whiskey from distillers located outside of the State, to be delivered to the individual in this State who ordered the same.

No doubt they are basing their contention under that part of Section 22 of Chapter 49, Public Laws of 1937, which is, in part, as follows:

"Except a person may purchase legally outside of this State and bring into the same for his own personal use not more than one gallon of such alcoholic beverage" . . .

As to this, we are of the opinion that this is a personal privilege extended by the Act and one that cannot be delegated to an agent or any other person for this purpose.

This law provides that no liquor may be sold in this State except through the duly established county liquor stores in those counties which have adopted the provisions of the Act. C. S. 3411 (h),—the Turlington Act,—provides in effect that in case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county wherein the delivery was made by such carrier or consignee, his agent, or employee.

In the case of *State vs. Langley*, 209 N. C., 178-182, the Court held that where there was no provision in the 1935 Liquor Law expressly or by implication repealing, amending, or modifying a former law on the subject, that such former law was not repealed.

We have this same situation in the question presented here. There is no provision in the 1937 Liquor Law which expressly repeals the section of the Turlington Act quoted above. We advise, therefore, that it would be a violation of the law for common carriers to transport intoxicating liquor into this State to individuals who ordered the same from a distiller outside the State.

SUBJECT: CLOSING A. B. C. STORES ON ELECTION DAYS

11 May, 1938.

This office is of the opinion that primary election days should be considered election days within the meaning of the 1937 Liquor Control Act, and that A. B. C. Stores in this State should be closed on such days.

SUBJECT: JURISDICTION AND AUTHORITY OF THE STATE BOARD OF ALCOHOLIC CONTROL IN DRY COUNTIES

21 May, 1938.

I have your letter of May 13th in which you write as follows:

"This office has had many requests for a ruling from you as to whether or not our Board has any jurisdiction or authority in dry counties.

"I would appreciate your giving me a ruling on this as soon as possible."

Section 1 of Chapter 49, Public Laws of 1937, under which your Board is established, provides that the purpose of the Act is to establish a system of control of the sale of certain alcoholic beverages under a uniform system throughout the State.

Section 4, defining the power of your Board, provides in part as follows:

"(a) To see that all the laws relating to the sale and control of alcoholic beverages are observed and performed."

This subsection of Section 4, together with subsection (m) of Section 4, giving the Board "all other powers which may be reasonably implied and incidental or convenient to the performance of the expressed powers granted" are the only provisions which may be considered as giving your Board authority in the dry counties. I assume in writing me you have reference to police powers in dry counties; that is to say, with respect to enforcement of criminal violation of laws against the sale of intoxicating beverages in the State, as provided in the 1937 Act, and all other laws upon this subject.

On the other hand, I find Section 4, subsection (g), provides that the State Board shall have "the power to approve or disapprove all regulations adopted by the several county stores for the enforcement of the alcoholic beverage control laws in violation of this Act."

Subsection (h) of this section gives the State Board power "To require that a sufficient amount shall be allocated to insure adequate enforcement,

not less than five per cent, nor more than ten per cent of the net profits arising from the sale of alcoholic beverages." This necessarily has reference to net profits made by the county stores and the provisions contained in Section 10, (j), (o).

It is to be noted that nowhere in the Act is any direct or express power or authority given to the State Board to appoint the enforcement officers with police powers. The only source from which this might be inferred is the above referred to provisions contained in Section 4.

In Section 10, defining the powers of the county boards, provision is made for the enforcement of criminal violations of the laws. Subsection (j) provides that the county boards shall have power "to investigate and aid in the prosecution of violations of the Act and other liquor laws, by whatever name called, and to seize alcoholic beverages" etc., and "cooperate in the prosecution of offenders in any court in said county."

Subsection (o) requires the local county board to spend for law enforcement not less than five per cent, nor more than ten per cent of the net profits, and requires that they employ one or more persons directly responsible to the county board and that the person so appointed, after taking the oath of office prescribed by law for peace officers, shall have the same powers and authority within the respective counties as other peace officers.

From the above quoted or referred to sections, it seems clear to me that the General Assembly contemplated that the provisions of the 1937 Act should be enforced by the county boards under supervision and direction of the State Board for which a direct provision is made.

In this letter, I am discussing only the question of the authority of your Board to engage and employ police officers to enforce the laws against the sale of intoxicating liquors in dry counties, and those counties which have voted in favor of county stores. I am not discussing other features of the Act which have no reference to the police powers of your Board.

It is, therefore, my opinion that your Board does not have any jurisdiction or authority in dry counties to engage in enforcing the prohibition laws in such counties.

OPINIONS TO HISTORICAL COMMISSION

SUBJECT: HISTORICAL HIGHWAY MARKERS; SALARY OF RESEARCH WORKERS

3 June, 1937.

The question has arisen whether or not the salary of a research worker to be employed in the office of the Historical Commission could lawfully be paid out of the \$5,000.00 annual appropriation authorized by Chapter 197, Public Laws of 1935, for the erection of markers at points of historical interest along the public highways.

I regret very much to say that, in my opinion, it is not the intention of the act in question that such salary should be paid out of the \$5,000.00 annual appropriation. It seems to me that the intention of the General Assembly in this connection is disclosed by the following paragraph from the preamble to the act.

"Whereas, at the request and pursuant to a resolution of the Department of Conservation and Development, and the State Historical Commission, a group of five historians, one from each of the following named institutions of learning: Duke University, University of North Carolina, North Carolina State College, Wake Forest College and Davidson College, together with the State Historian, have agreed to serve as an advisory committee without expense to the state, and to designate such points of historic interest in the order of their importance, and to provide appropriate wording for their proper marking;"

I believe that it is apparent from the paragraph cited that it was contemplated that any research work necessary would be conducted by the group of five historians mentioned in the act; and since they have agreed to serve without expense to the State, it seems that the General Assembly passed this act under the belief that any necessary research work would involve no costs whatsoever to the State, and that the annual appropriation would be used in the actual erection of the markers for which the act provides.

OPINIONS TO BOARDS OF EXAMINERS OF PLUMBING AND HEATING CONTRACTORS

SUBJECT: MUNICIPAL TAXATION; HEATING AND PLUMBING CONTRACTORS

17 August, 1937.

Receipt is acknowledged of your letter of August 14th in which you ask for an opinion as to the constitutionality of an ordinance, No. 243, adopted by the City of Asheville, North Carolina, imposing certain taxes upon every person, firm, or corporation who for a fixed price, commission, fee, or wage, engages in the business with the general public for plumbing, heating, sprinkling and gas fitting. This ordinance provides that no person, firm, or corporation doing business under the section above referred to shall be granted any permit and no inspection shall be made where such permit or inspection is required unless they have paid the city privilege license levied by this ordinance.

Your letter advises that it is contended by certain plumbing and heating contractors in the City of Asheville that the last mentioned requirement is unconstitutional, as imposing a tax upon the inherent right of every person to labor. You ask my opinion as to the validity of the tax and the requirements of the ordinance affecting the permits.

Under Section 155 of the Revenue Act of 1937, a tax is imposed by the State of a similar nature upon persons engaged in the trades mentioned in this ordinance. Subsection (a) of this section provides that cities and towns may levy a license tax not in excess of the base license tax levied by the State. The tax levied by the City of Asheville by this ordinance does not appear to be in excess of the base license tax imposed by the State under Section 155 of the Revenue Act and, therefore, the taxing ordinance is expressly authorized by this section. In addition to this authority, the municipality is given the right to levy this tax under C. S. 2677, which empowers a municipality to annually lay a tax on all trades, professions, and franchises carried on or enjoyed within the city, unless otherwise provided by law. It is not otherwise provided by law, but under the Revenue Act of 1937, Section 155, the tax, as above stated, is expressly permitted.

The tax may not be condemned as being contrary to organic law and violative of the constitutional right of a person to work. The tax is laid upon the trade or profession, as it may be more properly styled, of engaging in the business described in the ordinance. Many other taxes of similar nature are imposed by various municipalities, as well as in the Revenue Act under Schedule "B" taxing various trades, professions, and businesses.

The part of the ordinance providing that no permit shall be issued or inspection made for any person engaged in such business unless the tax has been paid is, in my opinion, valid. In the case of *Roach v. Durham*, 204 N. C. 587, a somewhat similar situation was before the Court and the action of the City Inspector refusing to grant a permit to a person who had failed to comply with Chapter 52, Public Laws of 1931, was upheld. The reasoning of the Court in the *Roach* case seems applicable here.

SUBJECT: PLUMBING AND HEATING CONTRACTORS; APPLICATION OF CHAPTER 338, PUBLIC LAWS OF 1935, TO CHAPTER 52, PUBLIC LAWS OF 1931

8 September, 1937.

We have your letter of August 27th in which you inquire as to the intent, purpose, and application of the above statutes, with particular reference to Morehead City, the Town of Beaufort and Atlantic Beach, Albermarle, Southern Pines, Pinehurst, and the unincorporated towns and villages in New Hanover County. This will advise you that this office is of the opinion that it was the purpose of the 1935 Act to place the above towns and cities within the provisions of the 1931 Act, which by its terms was only applicable to towns of more than 3500 population. Section 6 of the 1931 Act is still in force with regard to the population limitation, with the exception of those towns which were placed within its terms by the 1935 statute.

You also inquire as to whether the 1935 Act advances the exemption date set forth in Section 12, Chapter 338, Public Laws of 1935. This office is of the opinion that no such advancement was intended by the 1935 Act, and the persons, firms, and corporations within the areas described in the 1935 Act are now required to stand examinations given by the Board in order to secure from it permits to carry on plumbing and heating contracting, unless such person, firm or corporation complied with the provisions of Section 12 of the 1931 Act.

SUBJECT: PLUMBING AND HEATING CONTRACTORS; TYPES OF CONTRACTORS INCLUDED

11 February, 1938.

I received your letter of January 27th, referring to the provisions of Chapter 52, Public Laws of 1931, as amended, Michie's Code sections 5168 (rr) to 5168 (ddd). It is noted that the by-laws of the Board have adopted a construction of the statute which considers that the application of the Act does not include heating contracts for direct fire heating systems, often referred to as hot air systems.

After a careful consideration of the provisions of the Act, I am unable to agree with the conclusion reached by your Board, and it is my opinion that direct heating systems, as well as other types, are included within the provisions of the statute. You refer to the provision in section 12 to the effect that all persons engaged in the plumbing and heating business and holding a State License as of the date of the Act, may be licensed without examination upon payment of the required fee. You call attention to the provision of the Revenue Act then in effect, under which no license fee was required of persons engaged in installing direct heating systems as it applied to plumbers, steamfitters, etc.

While under this provision such persons are entitled to a license, this does not mean that where otherwise applicable, the persons coming under the law would not be required to be licensed.

In the case of *Roach v. Durham*, 204 N. C. 587, which upheld the constitutionality of the Act creating your Board, the Court in furnishing reasons for the constitutionality of the Act, says:

"The manifest purpose of the law is to promote health, comfort, and safety of the people by regulating plumbing and heating

in public and private buildings. The business of putting into buildings tanks, pipes, traps, fittings and fixtures for conveying water, gas, and sewage, requires proficiency and skill, the want of which is the source of epidemics, *as the lack of proper heating is the source of danger, discomfort and disease.*"

The underscored portion of this quotation having reference to proper heating makes no distinction as to the source from which the heat may be derived. There would exist as much reason for protection of health in a direct heating system as there would be in any other kind. I, therefore, feel that the term "heating contracting business" would include direct heating systems as well as other kinds.

Your second question was, in the event of the above answer given, whether or not your Board would have a right to issue a license without examination to persons engaged in direct heating contracting business at the time of the ratification of the Act. There is no provision in the law under which such a license could be issued without examination.

Your third question was whether or not you would have a right to limit the scope of the Act to confine it to certain types of heating systems. In my opinion, you would not have such a right. Your Board would not have the power to confine the provisions of the law to a narrower field than is provided by the law itself.

SUBJECT: STATUTES OF LIMITATION; PENALTIES; LIMITATION UPON STATE

2 June, 1938.

Reference is made in your letter of May 31st to section 7, Chapter 52, Public Laws of 1931, which provides in substance that upon the failure of a person to pay a plumbing or heating contractor's license as required by the section, "the board shall increase such license fee ten per centum for each month or fraction of a month that payment is delayed; Provided, that the maximum fee for renewal of license shall not exceed twice the regular annual fee."

The question involved is whether or not, under this statute, penalties accruing against the taxpayer are barred by the one year statute of limitations prescribed by C. S. 443 (2). That section reads as follows:

"2. Upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part to the party grieved, or to a common informer, except where the statute imposing it prescribes a different limitation."

It is to be noticed that this statute of limitations applies where it is necessary to bring an action in order to recover a penalty. In the case outlined in your letter, no action is required since the taxpayer is liable for the penalty only in case he elects to have his license renewed. You are, therefore, justified in our opinion in requiring that the penalty be paid as a condition precedent to the issuance of the license. It is only where an action is instituted to recover a penalty due that the statute applies.

OPINIONS TO PROBATION COMMISSION

SUBJECT: PROBATION; PERIOD OF PROBATION OR SUSPENSION; LIMITATION

30 December, 1937.

We answer your inquiries in the order presented.

(1) Section 4 of Chapter 132, Public Laws of 1937, the Act which created the Probation Commission, specifically provides that the period of probation or suspension of sentence shall not exceed a period of five years and further provides that the period shall be determined by the court within these limits, however, where the court exceeds these limits the defendant may be held on probation for a period of five years.

(2) You state that the commission gave you authority to have Judgment Docket fillers printed for distribution to clerks of the various courts of the State with the thought that they could substitute these pages which contain the entire Judgment in their loose leaf Judgment Docket. We are not advised as to whether or not the commission authorized you to furnish these blanks for use in all the criminal courts of the State free of charge but suggest that perhaps this might incur such expense to your Department that your budget would not permit these to be furnished free of charge. This, of course, is a matter for your determination and we call your attention to the provisions of Section 7 of the Act which provides in effect that the commission shall make up and submit a budget covering its proposed expenditures and that no funds shall be available unless such budget is first approved by the State Highway and Public Works Commission and by the Director of the Budget.

We think that the entire Judgment including the parole conditions and other regulations laid down by the court when a defendant is sentenced should be preserved among the court records of the case but the Statute 952 (2) (7) requires only that the clerk's Judgment Docket shall contain a record of the sentence. Every Judgment and every proceeding subsequent thereto and the criminal docket shall contain a note of every proceeding in each criminal action. If the court which sentenced the defendant should require the entire Judgment with all conditions and regulations therein contained to be recorded, of course the clerk would be bound by any such order but the full Judgment must be made a part of the minute docket and the Judgment Docket Fillers referred to in your letter may be made a part of the minute docket by a detailed reference thereto.

(3) We are of the opinion that Judge Sinclair was correct when he ruled that the bond executed by the defendant in a criminal case should be a continuing one covering the entire period of probation. In case the defendant is unable to give such a bond the court may in its discretion allow the probationer to go on his own recognizance.

(4) In answer to the question as to whether or not a probationer is entitled to be released on bond when he has been arrested and put in jail for a violation of the conditions imposed by the court in the Judgment placing him on probation, we call your attention to the provisions of Section 4 of the Act which provides among other things that at any time during the

period of probation . . . the court may issue a warrant and cause the defendant to be arrested for violation of any of the conditions of probation and when a warrant has been so issued to provide that the defendant be brought before the court who shall proceed to deal with the defendant as if there had been no probation or suspension of sentence. It is further provided in this section that upon proper written statement by a probation officer that the defendant has violated the conditions of his probation that any police officer or any other officer with power of arrest may forthwith arrest such defendant and he shall be dealt with by the court in the same way and manner as if he had been arrested under proper warrant issued by the court.

We are of the opinion that under these circumstances a defendant would be entitled to bail pending the hearing before the court which placed him on probation.

(5) The question as to whether or not a defendant who has been placed on probation and arrested for violation of conditions of the same would be entitled to a deduction from a sentence of the period of time which he remains in jail pending a hearing before the court would in our opinion be entirely within the discretion of the trial court.

(6) Section 4 of the Act specifically provides that a probationer is entitled to a hearing before the court which sentenced him on the question as to whether or not he has violated the terms of his probation.

(7) In reply to this inquiry we advise that a person convicted of a misdemeanor is not deprived of his citizenship.

(8) When a person has been convicted on more than one count, service on these counts runs concurrently, unless the judge orders that the terms be served consecutively. Where there is a sentence to prison on one count, as to which the prisoner is not put on probation, and on another count, as to which he is put on probation and the prisoner is serving his prison sentence, nevertheless, despite the fact of probation as to the one count, unless the judge orders otherwise, there is the presumption of law that he is serving both sentences concurrently, and since it is physically impossible to send him to jail and put him on probation at the same time, at the end of the jail sentence or prison sentence, if that be shorter than the other, then the order of probation is effective for the remaining part, or the unserved part, of the term on that count. Where, however, the judge has ordered that the terms be served consecutively, the prison term has nothing to do with the term as to which he is placed on probation.

It seems to me that such a situation, however, is too remote for serious consideration, because it is inconceivable to me that the judge would sentence a man to jail on one count and place him on probation on another.

SUBJECT: PROBATION: VARIOUS QUERIES RELATING TO; JURISDICTION AND POWERS OF THE COURT

21 April, 1938.

Answering the questions contained in your letter of April 13th in order, I beg to say:

1. The juvenile court, established under Consolidated Statutes Section

5039, has jurisdiction of juvenile delinquents under the age of sixteen. This jurisdiction is exclusive and original and is not based upon the theory of commission of crime and punishment thereof which obtains with other courts. A juvenile delinquent is not a criminal, and while a species of probation is recognized in this court, it has nothing to do with the probation provided in Chapter 132, Public Laws of 1937, for persons convicted of crime. See C. S. 5050.

Where the punishment for a crime may be ten years or more in the State's Prison, a juvenile between the ages of fourteen and sixteen may be tried as an adult and punished. C. S. 5047 (6).

Where such a juvenile has been convicted as an adult, the regular probation provided by Chapter 132, Public Laws of 1937, would be applicable.

Where inadvertently a juvenile under sixteen years of age and not coming within the provisions of 5047 (6), has been committed to the care of your Department, the case ought to be brought to the attention of the Court to the end that it be remanded to the juvenile court for proper attention. The question of double jeopardy does not enter into the matter, as it is a question of jurisdiction, and jeopardy never applies where the original court did not have jurisdiction. *State v. Newell*, 172 N. C. 933.

2. Where the probationer leaves the State without permission of the Court and refuses to return, it becomes a matter of extradition in the ordinary way. In cases of extradition, the county pays the expense of the return of the prisoner in case of misdemeanor, and the State in case of felony. C. S. 4556 (24)

3. Where there is an appeal from the sentence of the Court, the prisoner is not serving his term during the period of the appeal even though he may be in jail for safe-keeping. *People v. Toman*, 367 Ill. 163, 10 N. E. (2d) 657. Such sentence does not begin until the appeal is terminated and the defendant is returned to the custody of the Court, such termination of the appeal being either by withdrawal or determination of the higher court. This assumes that execution has been stayed by compliance with C. S. 4654. Of course, probation does not begin until the sentence begins.

4. Technically speaking, a convicted person is not in the custody of the parole officer and the fact that he has not contacted such officer before leaving Court, does not delay the beginning of the sentence and the beginning of probation.

5. In my opinion, the Court has no right to discharge a probationer and thus terminate the supervision before the expiration of the original time provided for probation. In this connection, I have carefully examined Section 3 of the Probation Law, which provides "that the court shall determine and may at any time modify the conditions of probation, and also Section 4 relating to the termination of probation, providing "that the period of probation or suspension of sentence shall not exceed a period of five years, and shall be determined by the Judge of the Court and may be continued or extended within the above limit."

I do not consider the period fixed for the duration of probation as one of its conditions coming within Section 3, and Section 4 does not directly permit the shortening of the term of probation, once fixed.

6. No Judge of the Court having jurisdiction to admit a convicted person to probation, has the power to make as a condition of such probation that the prisoner shall work for or under the control of any particular person, or to fix the term of a contract between such probationer and his employer.

It is true that Section 3 sets up certain conditions upon which probation may be extended, provided that they "or any other may be included within the judgment." However, it is my opinion that the courts would not sustain any condition of this sort which smacks more of peonage than it does of probation.

Other instances of specific conditions providing that the probationer should be hired to a certain person and fixing the term of the contract, in my judgment, fall within this objection.

OPINIONS TO UNEMPLOYMENT COMPENSATION COMMISSION

SUBJECT: A. B. C. BOARDS; EXEMPT FROM UNEMPLOYMENT COMPENSATION
ACT

18 March, 1937.

In considering the significant and essential nature of the Alcoholic Beverage Control Boards established under the Pasquotank Act, Chapter 493, Public Laws of 1935, and similar Acts, we must keep in mind the background out of which the legislation came and its aim and purpose. In the legislative debates, reflecting both sides of popular feeling on the subject, the prevailing argument was in favor of *control of liquor traffic*, rather than prohibition, and this legislation was evolved as a method of *control*. It does not need reference to these debates, however, to determine, from the reading of the Acts, that the purpose of the laws is to place the liquor traffic under control of the State, or its political subdivisions, the counties mentioned, as a matter of police regulation, and under the police power of the State, properly delegated to the county.

In order to anticipate a further suggestion that might be made, namely, that a part of the activities of the A. B. C. Board is proprietary in character, I do not think that question arises under the 1936 Unemployment Compensation Law. Section 19 (g), (7) (A), exempts "services performed in the employ of the State or of any political subdivision thereof, *or of any instrumentality of this State or its political subdivisions.*"

In my opinion, the Alcoholic Beverage Control Boards mentioned are instrumentalities of the counties for the purpose mentioned, and employment by such Boards does not come within the purview of the statute.

SUBJECT: STATE UNEMPLOYMENT ACT; PAYMENT OF BENEFITS; WHEN DUE

29 October, 1937.

You desire my construction of the State Unemployment Compensation Act, Chapter 1 Public Laws Extra Session 1936, with respect to the date on which relief payments are due under that Act, and I reply as follows:

When the General Assembly was called in extraordinary session, in December 1936, there were two important purposes to be accomplished by the immediate adoption of an Unemployment Compensation Act satisfactory to the Federal Social Security Board: First, that the Federal taxes on unemployment amounting annually to several million dollars might not be taken out of the State and lost to it even for the first year, but that it might be returned to the State in the shape of relief of unemployment; and, second, that such relief to the unemployed might not be delayed by failure of a timely adoption of the Act. It was thought that both these results could be secured by the adoption of our present Unemployment Compensation Act during the year in which the Federal Government began to collect its taxes.

The question here is as to whether or not the Legislature accomplished or failed to accomplish its purpose with regard to the time or date at which unemployment relief begins.

Section 3 of the Act provides:

"Section 3 (a). Payment of Benefits. Twenty-four months after the date when contributions first accrue under this act, benefits shall become payable from the fund."

In order that this date might be definitely fixed as of January 1, 1938, the date at which unemployment relief benefits become payable under the Federal law, the Legislature saw fit to provide as follows:

"Section 7. (a) Payment. (1) On and after January one, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section nineteen (g), occurring during such calendar year."

I think the effect of this was to make unemployment relief benefits payable on the first day of January, 1938, and there is no possible question that the Legislature so intended.

We find, however, under the eligibility conditions of the Act, Section 4 (e) that the employee is eligible only if the Commissioner finds that "he has within the first four out of the last five completed calendar quarters immediately preceding the first day of his benefit year earned wages of not less than sixteen times his weekly benefit amount." This has been called the "trailing base," which follows the employee through the history of his employment and determines his eligibility. The difficulty hereinafter mentioned in determining that eligibility will obviously not be encountered again. Five completed calendar quarters could not elapse between December 16, 1936, and January 1, 1938, the date on which the law says such weekly benefits are payable; and probably the history of employment, as reported by the employers and as kept in separate employment accounts by the Commission, will give no information as to employment prior to date as to which employers were required to report.

In my opinion, however, in an aspect of the statute which is procedural, the provisions of this section cannot be permitted to override the plainly expressed purpose of the Act, to-wit, that such payments should begin on January 1st, and it will be the duty of the Unemployment Compensation Commission to adjust its procedure to the superior mandate of the law.

It will, therefore, be necessary, in my opinion, when the records do not disclose the facts upon which eligibility is determined, to get such further information as may be possible with regard to the history of employment of the particular applicant, and pass upon his eligibility in accordance therewith. It will be noted here that really the suggested defect, if any, which might have the effect of postponing the payment of relief benefits to April 1, 1938, is not in the manner in which the law has stated the eligibility, but in the fact that no sufficient history of employment is contained in the records or reports which are required of employers and to which the Commission might have easy access, and upon which it might conveniently pass upon the eligibility. In my opinion, such a procedural difficulty does not go to the merits of an applicant for relief which, under the law, is payable on January 1, 1938, as stated.

The first quarter of the year from January 1st to April 1st is, perhaps, the most difficult to the employee, and that quarter of the year in which unemployment is more distressing. While this fact alone could have no

particular bearing upon the construction of a statute, in this instance it is well to bear in mind that it was concededly the intention of the Legislature, as gathered both from the debates which occurred in both Houses upon the measure, and also from the Act itself, to prevent unemployment distress at the earliest moment possible, and thereby place the State in complete alignment with the Federal Social Security Act, taking advantage of its benefits according to its terms and according to the dates therein fixed for the payment of benefits.

I am, therefore, of the opinion that the Unemployment Compensation Commission should begin the payment of benefits on January 1, 1938, or as soon thereafter as applications may be heard and determined.

SUBJECT: INSURANCE COMPANIES; MEMBERS FEDERAL HOME LOAN BANK;
UNEMPLOYMENT COMPENSATION

11 December, 1937.

I have had on my table for sometime your letter of inquiry and accompanying document, relating to the claim of the Jefferson Standard Life Insurance Company that it is not subject to the taxes levied upon employment under the Unemployment Compensation Act by reason of its membership in the Federal Home Loan Bank.

Subsequent to the enactment of the State Unemployment Compensation Act (Chapter 1, Public Laws Extra Session 1936), the Jefferson Standard Life Insurance Company availed itself of the provision of the Act of Congress, July 22, 1932, Chapter 522, paragraph 4, 47 Stat. 736; June 13, 1933, Chapter 64, paragraph 3, 48 Stat. 129; U. S. C. A. 1424, by purchasing the requisite stock in the Federal Home Loan Bank, thus becoming a member.

The corporation now claims that it is by virtue of such membership an instrumentality of the Federal Government and, therefore, comes within the exemption of Section 19, subsection (7B), of the State Unemployment Compensation Act.

There are several other insurance companies in like position, and making a like claim of immunity from the tax.

No brief has been filed with your department, nor with this, by the Jefferson Standard Life Insurance Company, or other interested companies; but a ruling of Honorable Guy T. Helvering, United States Commissioner of Revenue, upon the federal question is to the effect that these companies are federal instrumentalities and, therefore, immune from the federal tax.

One of the companies interested has brought to my attention the case of *Clallam County v. United States of America* and *United States Production Corporation*, reported in 68 L. ed., page 328, supposed to support this view, but I think supporting the contrary view.

Our research into this matter has, of course, gone much further than the authorities cited, but I see no reason why at this time my opinion to you should be prolonged to an unusual length by a citation and comparison of authorities.

Whatever significance may be attached to the loosely used term "member", I am convinced that we must go much further into the matter and decide the question upon a view if the functions really performed by the

protesting taxpayer and in what respect its activities may be considered so far bound up in the promotion of federal enterprise or in the performance of federal governmental functions as to justify a treatment of the corporation itself as a federal instrumentality, and for that reason immune from State taxation with respect to employment.

Looking at the matter from this point of view, I find that the Jefferson Standard Life Insurance Company is a corporation under the laws of the State of North Carolina, engaged in the principal business of its creation, to wit, selling life insurance and incidentally, of course, investing its funds in such securities as may be safe and permitted by law. With the membership in the Federal Home Loan Bank goes some degree of federal supervision and the eligibility, under certain circumstances, to borrow from the Federal Home Loan Bank and have certain papers of the insurance company discounted by said bank. A point of significance, however, is that in the federal act referred to, providing for such membership of insurance companies, a "member" may be designated as a "fiscal agent" of the Federal Government.

We have to consider these relations created, or to be created, between the insurance company and the Federal Government, arising upon "membership" in the Federal Home Loan Bank in connection with the implications involved in the term "instrumentality of the United States Government," which is used both in the Federal Social Security Act and in the State Unemployment Compensation Act, and compare the decisions which have been rendered by the United States Courts in situations which are more or less analogous to the one we are considering.

Perhaps the Federal Courts have not sufficiently stressed the distinction between a State corporation used in whole or in part for federal purposes, and a corporation or agency created by the Federal Government for its own purposes. In *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, I think the decision of the Court was considerably influenced and, indeed, substantially based upon the fact that the Court was dealing with a federal corporation and with the almost inseparable idea that Congress had created a corporation for Federal use alone. *Ernest K. James, et al. v. Grabo Contracting Company, Advance Sheets*, decided December 6, 1937, United States Supreme Court; *Clallam County v. United States*, *supra*.

In one case, at least, dealing with the non-taxability of Federal Land Banks and Joint Stock Land Banks in certain particulars, an influencing factor in the decision of the Courts is the fact that they are empowered by the federal statute to assist in the Government's fiscal activities. *Smith v. Kansas City Title and P. Company*, 65 L. ed. 577; U. S. C. A. 1464(k). It is true that in the case of State corporations, insurance companies, which have become members of the Federal Home Loan Bank, the Act of Congress provides that such corporations are eligible to be designated as fiscal agents of the government, but "it doth not yet appear" that the Jefferson Standard Life Insurance Company has been so designated, and the claim of immunity from the tax is probably founded upon the theory that "they also serve who only stand and wait."

In my mind, there is a substantial difference between a State created corporation engaged in a non-governmental enterprise and in a non-gov-

ernmental business, of which the United States Government may avail itself in some small particular as a governmental agency, if it might be called so, and a corporation created under an Act of Congress and by the Federal Government to carry on activities which are essentially governmental in their character. And I cannot agree that the modicum of governmental function which this insurance company, under the Act of Congress, may be called upon to perform, but as to which it is now only a "stand-by",—and it is to be observed, too, that the insurance company may by withdrawal of its stock avoid even this obligation and refuse to accept the designation,—is of such a character as to make it an instrument of the Federal Government within the meaning of our Unemployment Compensation Law. To do so would, in my judgment, reduce the whole proceeding to the level of a tag process by which the Government, in consideration of the investment of a more or less substantial sum in the stock of the Home Loan Bank, attempts to reward the insurance company by conferring upon it something which under the circumstances it was not within its right or power to bestow: that is, immunity from the State tax.

The matter is not of great importance to the State, provided the load of taxation carried by each industry or enterprise is fairly well adjusted to its own employment, as these two factors cancel out; it is of some importance, however, since the State, having adopted the policy of social security as represented by relief of unemployment, would like to extend the policy equitably to all those who should reasonably enjoy its benefits.

In my opinion, therefore, the Jefferson Standard Life Insurance Company is liable to the tax imposed by the State Unemployment Compensation Law, and is not exempted by Section 19, subsection (7B) thereof, as an instrumentality of the Federal Government.

SUBJECT: UNEMPLOYMENT COMPENSATION ACT; REGULATIONS OF
COMMISSION; ESTABLISHMENT OF MERIT SYSTEM

1 June, 1938.

You have submitted to this office a draft of proposed regulations for the establishment of a merit system and for the administration of personnel in the Unemployment Compensation Commission. The question arises as to the right of the Commission to adopt these rules and regulations.

Section 13-a of the Unemployment Compensation Act provides in part as follows:

"The Unemployment Compensation Administration Fund, except as otherwise provided in this Act, shall be subject to the provisions of the Executive Budget Act, Chapter one hundred, Public Laws one thousand nine hundred and twenty-nine, the provisions of the Personnel Act, Chapter two hundred and seventy-seven, Public Laws one thousand nine hundred and thirty-one, and Chapter forty-six, Public Laws of one thousand nine hundred and thirty-three, which are re-enacted in the first paragraph of section seventeen of Chapter three hundred and six, Public Laws one thousand nine hundred and thirty-five."

It is to be noticed that section 17 of Chapter 99, Public Laws of 1937, re-enacts the provisions of the Executive Budget Act, just as was done in

the first paragraph of section 17, Chapter 306, Public Laws of 1935, quoted above.

The provisions of the Executive Budget Act and the Acts relating to the Division of Personnel are collected in Michie's Code as sections 7486-j to 7486-oo, and 7521-k to 7521-y. Under the Executive Budget Act, the Director of the Budget is given power to authorize and to prescribe the manner in which disbursements from departments and agencies of the State shall be made (C. S. 7486-l and 7486-n). Under the Personnel Act (C. S. 7521-n), the Assistant Director of the Budget, as Supervisor for the Division of Personnel, is empowered to determine and classify the necessary number of employees in all the departments and agencies of the State, and to establish a standard of salaries and wages to which they shall be entitled.

An examination of the proposed rules and regulations discloses that it sets up under the direction of an Advisory Committee on Personnel a complete system for conducting merit examinations and a comprehensive plan for the payment of compensation for positions in the Commission. Salary schedules for the various classes are established (Rule 5).

We are of the opinion that these provisions conflict with the statutes above referred to. In view of the fact that the Legislature placed the Unemployment Compensation Fund under the direction and supervision of the Budget Bureau and thus within the terms of these statutes, it seems to us that the Unemployment Compensation Commission lacks the authority to establish its own salary schedule.

We do not intend by this letter to express any opinion against the right of the Commission to establish a merit system to be used in the selection of its personnel. That right has been specifically conferred upon the Commission by section 11-d of Chapter 1, Public Laws, Extra Session of 1936. We do not think, however, that in prescribing such rules and regulations, the Commission has the authority to adopt those contained in the draft submitted to us.

SUBJECT: UNEMPLOYMENT COMPENSATION ACT; DELEGATION OF
AUTHORITY AS TO PERSONNEL

7 June, 1938.

Receipt is acknowledged of your letter of June 6, in which you submit the following question:

"With further reference to this proposal may we request your opinion as to whether in the establishment of a merit system the Commission could lawfully appoint an advisory committee of the type set forth in the proposed draft and delegate, as is there contemplated, the sole power and authority to establish and carry on the functions of the merit system."

Section 11(d) relates to the appointment and duties of personnel and provides that the Commission, subject to other provisions of the Act, is authorized to appoint, fix the compensation and prescribe the duties and powers of officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It provides for the holding of examinations and appointment based upon merit. It further pro-

vides as follows: "The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this Act * *." Under this provision, it is my opinion that the Commission could lawfully appoint an advisory committee to establish and carry on functions of the merit system, but it could not delegate the authority to appoint and fix the compensation of the persons to be employed. This must be done by the Commission itself, but it could act upon advice and recommendations of the Committee appointed for this purpose.

OPINIONS TO TEXTBOOK PURCHASE AND RENTAL COMMISSION

SUBJECT: ANNUAL AUDIT OF STATE TEXTBOOK PURCHASE AND
RENTAL COMMISSION

11 August, 1936.

In my judgment the statute relating to the audit of the State Textbook Purchase and Rental Commission is fully satisfied when an audit has been made by the State Auditing Department, and the statute does not contemplate the extraordinary expense of an audit by outside accountants.

As to the scope of the audit, I think this should be left to the Auditing Department, except that there should not be reduplication where the items are handled through regular channels and thus, of necessity, audited in regular course by the State Auditing Department.

SUBJECT: SCHOOL LAW; TEACHER'S CHECK; WITHHOLDING SAME FOR
FAILURE TO ACCOUNT

29 January, 1937.

The County Superintendent has no right or authority whatsoever to hold out a teacher's check, or refuse to deliver it, upon a claim, whether just or not, that the teacher has not accounted for books entrusted to her.

If it is a fact that the teacher has not so accounted, there may be other remedies to apply, but certainly not the one chosen. The action is without authority of law and the check should be delivered at once.

OPINIONS TO BOARDS OF BARBER EXAMINERS AND COSMETIC ARTS

SUBJECT: COSMETOLOGY; STATE BOARD; CREATED UNDER POLICE
POWERS OF STATE

20 October, 1936.

You inquire that inasmuch as the North Carolina State Board of Cosmetic Art is an agency of the State, if property in possession of this Board, held by virtue of its establishment and used in connection with the official duties of the Board, would be subject to ad valorem taxation, such property being in the form of office equipment and cash on hand, at the usual time for listing property for ad valorem taxation.

At the 1933 Session, the General Assembly enacted the series of statutes entitled "An Act to Regulate the Practice of Cosmetic Art in the State of North Carolina." This Act is to be found in Chapter 179, Public Laws of 1933. The Act provides that the Board shall consist of three members to be selected as therein provided, shall have a common seal for the authentication of its orders and records, shall form rules to govern its actions, shall keep a record of its proceedings and a register of all applicants for examination, and shall annually submit to the Governor a report of its activities, its receipts and expenditures, together with such recommendations as it may deem expedient.

Subsection 2 of Section 306, Chapter 417, Public Laws of 1935, exempts, among other things, "personal property directly or indirectly owned by this State . . ." The question now arises as to whether or not this Board is such an agency of the State as would make property owned by it exempt from ad valorem taxation.

We are of the opinion that it is such an agency properly created under the police powers of the State. As said by Justice Adams in the case of *Roach vs. Durham*, 204 N. C., 587-591, a case where the Act creating the State Board of Examiners of Plumbing and Heating Contractors was declared to be a valid exercise of the police power to the State: "The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. . . . To require proficiency and skill in the business mentioned is, as this Court has said, an exercise of the police power 'for the protection of the public against incompetence and impostors.' (S. v. Call, 121 N. C., 643.) It is upon this principle that the Legislature has required a license of physicians, surgeons, osteopaths, chiropractors, chiropodists, dentists, opticians, barbers, and others, and the right to exercise the power is generally conceded to be unquestionable. (Public Laws, 1931, Chap. 427, Sec. 109; Public Laws, 1929, Chap. 345, Sec. 140, et seq.; S. v. Call, supra; S. v. Locky, 198 N. C. 551.)"

The Act undertakes to regulate the practice of the cosmetic art by admitting thereto those who are skilled in the art and excluding therefrom others who might, except for the governmental regulations, enter the practice. In other words, the latter are excluded from a legitimate calling or

occupation only through the exercise of the police power of the State, through the State Board of Examiners. The latter is, therefore, exercising to some extent at least a governmental function.

The reasoning contained in the above opinion may well be applied in this case; that is to say, that the Board of Cosmetic Art Examiners was created under the broad police powers of the State for the protection of the public against incompetent operators in beauty parlors and hair dressing establishments, and it follows that personal property used by this Board in connection with its official duties would, in our opinion, be exempt from ad valorem taxation.

SUBJECT: CERTIFICATE OF REGISTRATION; STATUTE OF LIMITATION

27 October, 1936.

I have your letter of October 21. Section 20(a), Chapter 179, Public Laws of 1933, provides that every person who has been practicing cosmetic art in North Carolina and who is practicing such art at the effective date of the act, upon making an affidavit to that effect and complying with the provisions of this act as to physical fitness and paying the required fee to the Board of Cosmetic Art Examiners, shall be issued a certificate of registration as a registered cosmetologist. Section 25 provides that any registered cosmetologist who retires from practice for not more than three years may renew his or her certificate of registration upon the payment of required registration fee and furnishing renewal certificate as to physical fitness.

You inquire as to whether or not under Section 20(a) a person can be licensed who has failed to make application therefor for more than three years after the effective date of the act.

No limitation is named in the statute as to the date on which the application should be made under Section 20(a). The provision in Section 25, above quoted, does not directly provide any rule to meet this situation.

I am, however, of the opinion that under Section 20(a) it is contemplated that the application and affidavit would have to be made within a reasonable time after the effective date of the act. Reasoning by analogy to the three year limitation in Section 25, I am of the opinion that your Board would be justified in adopting the rule that limited the registrations under Section 20(a) to those persons who apply within three years from the effective date of the act.

SUBJECT: BARBERS ACT; OCCASIONAL BARBERING; LICENSE; EXAMINATION

8 October, 1937.

You inquire as to whether or not an applicant who only works one day a week in a barber shop and also an applicant who only does occasional barber work in his home is entitled to a license without an examination.

We are of the opinion that persons who do only occasional work, such as above described, are subject to the provisions of C. S. 5003 (a), and following, and that such a person who was not actually engaged in this business on the date of the enactment of the law, Chapter 119, Public Laws of

1929, which was ratified on the 19th of March, 1929, would be required to take the examination prescribed for those who desire to practice barbering in this State.

SUBJECT: STATE BOARD OF BARBER EXAMINERS; REVOCATION OF
LICENSE; APPEAL

21 January, 1938.

When the State Board of Barber Examiners have acted under Chapter 119 Public Laws of 1929, (as amended by Chapter 138 Public Laws of 1937), creating the Board, and have revoked the license of a barber because of fraudulent misrepresentation in obtaining it, and there is appeal therefrom, the proceeding is entirely civil and will no doubt be docketed by the Clerk of the Superior Court, when it reaches that officer, as a civil appeal.

SUBJECT: BARBERS LICENSE ACT; RENEWAL OF EXPIRED LICENSE

5 April, 1938.

I have your letter of April 4th. Section 18 of Chapter 119, Public Laws of 1929, provides in part as follows:

"Any registered barber who retires from the practice of barbering for not more than five years may renew his certificate of registration upon payment of the required registration fee."

Section 18 of Chapter 138, Public Laws of 1937, provides in part as follows:

"Provided, however, that a registered barber or registered apprentice whose certificate has expired for a period of three years shall be required to take the examination prescribed by the State Board of Barber Examiners, and otherwise comply with the provisions of Chapter 119, Public Laws of 1929, before engaging in the practice of barbering."

The 1937 Act repeals the conflicting provision in the 1929 Act. Therefore, a barber whose license expired on June 30, 1934, would now be required to take the prescribed examination, as provided in the 1937 Act.

OPINIONS TO STATE DRY CLEANERS COMMISSION

SUBJECT: DRY CLEANERS ACT; CUSTODY OF FUNDS

23 July, 1937.

Unfortunately, Section 7, Chapter 99, Public Laws of 1937, relating to the custody of the funds raised by that chapter in the administration of the Dry Cleaners Commission, provides that the money shall be paid into the general fund of the State Treasury. Nothing else appearing, that would mean that it could only be disbursed as other general funds, and that at the end of the fiscal year it would revert to the State.

In my opinion, however, reading the whole act, this was not intended; for the act itself limits the disbursement of this fund for the purposes of the act and, in my opinion, makes an immediate re-allotment to the Dry Cleaners Commission at the very time it goes into the treasury.

For this reason, I have advised that it constitutes a special fund, and that the budgetary requirements applicable to the general fund have no application here.

I do not regard the State Dry Cleaners Commission as a department or institution of the State in any manner at all and, for this reason, I do not think it is necessary that the purchases be made through the Division of Purchase and Contract. The purchases are within the discretion of the Commission.

SUBJECT: 1-NOTARIZATION OF PAPERS, ETC. 2-DRY CLEANERS ACT;
DOING BUSINESS WITHOUT LICENSE

16 September, 1937.

I have your letter of September 13th, and in reply thereto I beg to advise that a notary public would not have the right to notarize any paper which was not signed in his presence.

In reply to your further inquiry, I beg to advise that under Chapter 30, Public Laws of 1937, Section 5, it is provided that no person shall engage in the business of dry cleaning, dyeing, and/or pressing as defined in the Act, within the State of North Carolina, without first obtaining a license. The Act itself sets the limit upon the date on which the license must be secured. Under Section 7 of the Act, it is made a misdemeanor for any person to violate this provision. You, therefore, could prosecute any person who was engaged in the business without procuring a license.

OPINIONS TO N.C. RURAL REHABILITATION CORPORATION

SUBJECT: RE: NORTH CAROLINA RURAL REHABILITATION CORPORATION; TAXATION

15 January, 1938.

Chapter 314 Public Laws of 1935 created the North Carolina Rural Rehabilitation Corporation an agency of the State, and, in that Act, in my opinion, affirmed its charter theretofore filed with the Secretary of State in such a way as to make it to all intents and purposes a municipal corporation. At any rate, it was the obvious purpose of the Act to bring about this result, and it is not necessary here to question the power of the Legislature to do so, although there might be some legal argument to the contrary.

It is my opinion, therefore, that the property of the North Carolina Rural Rehabilitation Corporation is not subject to State or local taxation, and the recent case of Weaverville v. Hobbs, 212 N. C. 684, 194 S. E. 860 (1937) strengthens me in this view.

It is further to be noted that the corporation is a benevolent non-profit organization, and the administrative view heretofore is that it is not subject to State franchise tax, and I think this ruling is correct.

SUBJECT: NORTH CAROLINA RURAL REHABILITATION CORPORATION; NORTH CAROLINA BOARD OF RURAL REHABILITATION DISTINGUISHED; POWERS OF CORPORATION INDEPENDENT

8 April, 1938.

There is no organic connection between the North Carolina Board of Rural Rehabilitation, created by Chapter 459 of the Public Laws of 1935, and the North Carolina Rural Rehabilitation Corporation, incorporated under the general laws of this State and created a State agency by Chapter 314 of the Public Laws of 1935. The latter corporation appears to have been created under the general corporation laws of the State, C. S. 1114 et seq., and is, therefore, independent of any supervision or control by the former body.

It follows that the North Carolina Rural Rehabilitation Corporation is not required to have the consent of the North Carolina Board of Rural Rehabilitation in order to make a valid conveyance of its property.

SUBJECT: DIVISION OF PURCHASE AND CONTRACT; APPLICABILITY TO NORTH CAROLINA FISHERIES, INC.

30 April, 1938.

You inquire whether or not the North Carolina Fisheries, Inc., is eligible to purchase gasoline on State contract. C. S. 7502(c) setting up the Division of Purchase and Contract authorizes the Director to contract for supplies for the "State Government, or any of its departments, institutions, or agencies." Under this section, we do not believe that the North Carolina

Fisheries, Inc., could take advantage of the State contracts made by the Director of the Division of Purchase and Contract for the reason that the corporation is not in any sense an agency of the State.

In your letter you state that the Texaco Company which has been awarded the contract for gas in Carteret County, is willing to sell gas to the corporation on the State contract. Of course, there is no reason why the corporation should not obtain its gasoline at the lowest price possible, and if the representative of the Texaco Company is willing to sell to it at the same terms that apply to State agencies, there can be no objection on our part. By this letter we only mean to say that the North Carolina Fisheries cannot be classed as an agency legally entitled to the advantages derived from the contracts made by the Division of Purchase and Contract.

SUBJECT: AGREEMENT OF TRANSFER BETWEEN THE NORTH CAROLINA RURAL REHABILITATION CORPORATION AND THE UNITED STATES OF AMERICA

23 May, 1938.

There has been submitted to me for examination an Agreement of Transfer between the North Carolina Rural Rehabilitation Corporation and the United States of America, acting by and through the Secretary of Agriculture, which is proposed to be executed by the North Carolina Rural Rehabilitation Corporation and by the Secretary of Agriculture.

My opinion has been requested as to whether or not under the provisions of Chapter 314, Public Laws of 1935, creating the North Carolina Rural Rehabilitation Corporation and defining its powers and duties, the Board of Directors is authorized and empowered to enter into this agreement and cause its execution by the President and Secretary of the Corporation.

My study of the agreement and knowledge of the circumstances under which it is entered into cause me to answer this question in the affirmative. I, therefore, advise you that, in my opinion, when properly authorized by the Directors of the North Carolina Rural Rehabilitation Corporation, you may legally execute the contract without violation of the fundamental law or the Act of the General Assembly under which this corporation was created.

SUBJECT: RURAL REHABILITATION CORPORATION; ADMINISTRATION OF FUNDS

4 February, 1938.

In the next to the last paragraph of my letter of February 1st I suggest that some arrangement might be made between the Rural Rehabilitation Corporation and the Farm Security Administration by which the major part of the funds now in the hands of the Rural Rehabilitation Corporation might be administered by the Farm Security Administration. I do not mean by this that the Rural Rehabilitation Corporation was under any legal compulsion in the matter. In this respect, as I have said, the setup of the Rural Rehabilitation Corporation as a North Carolina Corporation and a State agency under the law was deliberately done with a full knowledge of its legal implications, and to it was granted certain funds to be handled in accordance with the charter. It is very clear that the whole subject of rural rehabilitation is one which cannot be dealt with

on a short-time basis and by frequent changes of both administration and policy. If, for no other reason, the commitments which are made by the Rural Rehabilitation Corporation, which have been many, and its duty to the enterprises already instigated and fostered and its duty to maintain its policies and faithfully administer its trust, suggest a permanency and continuity to that corporation or agency which was no doubt the purpose of those who created it by the advice, suggestion, or acquiescence, at least, of all the Federal authorities interested to bring about.

This, of course, involves a right of the Rural Rehabilitation Corporation to administer this fund to exhaustion without let or hindrance.

In this respect, I was only suggesting that if the Rural Rehabilitation Corporation felt that the government created agency is in position effectively to handle this fund with more promise of beneficial result than would ensue from the direct handling by the Rural Rehabilitation Corporation, it could legally adopt the Federal agency as its own, for the administration of this fund, under such conditions as might be imposed by the Rural Rehabilitation Corporation consistent with the retention of its trust and the supervision thereof. In making this statement, I fully realize the difficulty which might ensue from misunderstandings and want of cooperation or the desire for independent and unrestricted action on the part of the Farm Security Administration, if such desire should exist. I also had in mind the desirability of correlation of Federal agencies in the various objects of the administration relating to farm security and betterment of the condition of farmers and the farming industry.

However, after all of these things have been maturely considered by the Rural Rehabilitation Corporation, in my judgment that corporation has the right to act within its discretion in the matter and is entitled, if it so desires, to the exclusive administration of the funds which have been entrusted to it.

Particularly, I desire to say that any phraseology employed in any agreement between the Rural Rehabilitation Corporation and the Farm Security Administration which would evade the issue, and which would be tantamount to a complete surrender of its trust on the part of the Rural Rehabilitation Corporation would not be warranted by law. A simple conveyance of its assets to the Farm Security Administration, with the use of the words "in trust", would not sufficiently define the relationship between the two bodies as to come within the authority of the Rural Rehabilitation Corporation; the nature and extent of that trust should be set out in any such agreement if made, so that it might be made clear that the Rural Rehabilitation Corporation is keeping in its essential integrity, its authority, and its responsibility for the administration of this fund.

However, upon all this I do think, from the point of view explained in my previous letter, that it would be well worth while to consider such a cooperative agreement.

As to the stock of the corporation held by its members, of course, all of this stock seems to have been pledged initially to the Federal Emergency Relief Administration, for the faithful expenditure of the funds for the purpose for which they were granted. Later this stock, upon suggestion of the Federal Resettlement Administration, was by resolution of the direc-

tors of the Rural Rehabilitation Corporation transferred to the Resettlement Administration as a pledge for the carrying out of the agreement which had been made with that body. This stock now seems to be physically in the possession of the Farm Security Administration, without any further action on the part of the State corporation.

It is my opinion that the stock so pledged originally and later was pledged, without any legal consideration, for the obvious purpose of effecting a control of the corporation either as to its policies or as to its action in specific cases, and as such a device the pledge has no legal significance in this State and is, therefore, void. I do not think that at this time it is necessary to elaborate this proposition. In my opinion the stock should be returned to the stockholders of the corporation.

MISCELLANEOUS OPINIONS

SUBJECT: SCHEDULE "B" LICENSE TAX; FOREIGN CORPORATIONS;
OPERATIONS ON GOVERNMENT-OWNED PROPERTY

8 July, 1936.

Your letter of June 22 addressed to Hon. A. J. Maxwell, Commissioner of Revenue, has been referred to this office for reply.

You inquire whether a Virginia corporation, which is working on a Federal Highway Project under contract with the Federal Government, such work being done upon government-owned property, is subject to domestication and pay franchise, privilege, income and personal property taxes in the State of North Carolina. All work done by such contractor is being done within the boundaries of the State of North Carolina, but is being done on property owned by the United States Government.

The mere fact that the corporation is engaged in the performance of a contract with the Government does not mean that it is an instrumentality or agency of the Government. (*Trinity Farm Construction Co. vs. Grosjean*, 78 L. ed. 918; *Metcalf vs. Mitchell*, 70 L. ed. 387—plaintiffs were consulting engineers for the Government.)

It is true that where the government has acquired property for the "erections of forts, magazines, arsenals, dockyards, and other needful buildings," and has done this with the consent of the State, it has exclusive jurisdiction. (*Standard Oil Co. vs. Cal.*, 78 L. ed. 775; *United States vs. Unzeuta*, 74 L. ed. 761; *Surplus Trading Co. vs. Cook*, 74 L. ed. 1091.) Here, however, the property was not acquired for this purpose, and the jurisdiction of the State has not been lost.

In *Surplus Trading Co. vs. Cook*, supra, page 1094, it is said:

"It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal."

A case almost directly in point upon the question now involved is *Colorado vs. Toll*, 69 L. ed. 927, wherein it is held that an Act of Congress establishing a park within the limits of a state will not be construed so as to divest the state of her jurisdiction over the property.

From these authorities, it follows that there is nothing in the facts stated which would take the Virginia Corporation from the rule applicable to all foreign corporations doing business within the State.

From the above, we are of the opinion that this foreign corporation should be required to domesticate in this State before continuing operations.

SUBJECT: GASOLINE TAX; SALES ON GOVERNMENT RESERVATION FOR
PURPOSES OTHER THAN U. S. GOVERNMENT

14 July, 1936.

Hon. A. J. Maxwell, Commissioner of Revenue of North Carolina, referred to this office a copy of your letter of July 3, addressed to Governor Ehringhaus, with the request that we reply directly to you with regard to the matters therein inquired of.

The North Carolina Gasoline Tax Law is to be found in Chapter 145, Public Laws of 1931. The particular section of this chapter which levies a gasoline tax is to be found in Section 24, Subsection 5, which is in part as follows:

"There is hereby levied and imposed a tax of six cents per gallon on all motor fuels sold, distributed or used *within this State.*"

This taxing section may also be found in Consolidated Statutes 2613 (i-5), Michie's North Carolina Code of 1935.

There is no question but what this taxing statute is sufficient, since the passage of the Act of Congress quoted in your letter, to enable the State to collect a sales tax on gasoline sold on United States Military Reservations for other purposes than for the exclusive use of the United States Government.

For your information, the Commissioner of Revenue, or his duly authorized agents, are charged with the collection of the gasoline tax, and details with respect to its collection and payment should be worked out with his Department.

SUBJECT: PROPOSED SALE OF REAL ESTATE BY THE SCHOOL COMMITTEE
OF RALEIGH TOWNSHIP

18 November, 1936.

First. In my judgment the School Machinery Act of 1933, Section 4, in abolishing all school districts of whatever kind operates to repeal Sections 2 and 9 of Chapter 141, Public Laws 1885, in so far as the powers therein given to the School Committee of Raleigh Township are concerned.

This is based upon the assumption that Chapter 141 does create a school district for the maintenance of the schools and the conduct and regulation thereof in Raleigh Township, and dealing with the title of educational property therein under Section 9.

It is true that extraordinary powers were given to the School Committee of Raleigh Township such as were not usually given to school committees of the ordinary and usual type, but, in my judgment, this does not prevent the application of the sweeping terms used in the School Machinery Act, Section 4:

"Sec. 4. All school districts, special tax, special charter or otherwise, as now constituted for school administration or for tax levying purposes, are hereby declared non-existent" * * *.

That this was the purpose of the law seems clear, because of the provision at the end of this section:

"Provided, that in all cases where any existing special charter district is included in a district as determined by the State School Commission the trustees of the special charter district and their duly elected successors shall be retained as the governing body of such district *and the title to all the property of the special charter district shall remain with such trustees.*"

I do not know what was done by the Education Commission with regard to the creation of a City Administrative Unit in the place of abolished special charter districts in Wake County, but I am inclined to think that all which would remain to the Raleigh Township District in the way of title to school property would be the power to hold the same subject to the general law as to its disposal, which, of course, requires that such property when sold must be sold at auction by the County Board of Education. See C. S. 5470 (a).

Upon this point I would be glad to have your further suggestions, in case you do not agree with this interpretation. It is made here tentatively only.

Second. Under similar circumstances, I have been compelled to give it as my opinion that inasmuch as the law is silent as to the application of the proceeds of school lands thus sold, it would be best to await some legislative action giving authority and direction for its disposal. I have no doubt that some bill covering this point will be introduced.

Let me hear from you as to your views about the matter.

SUBJECT: DIVORCE; VALIDATING LAWS

20 January, 1937.

I have yours of January 18, 1937, enclosing letter of Mr. Irwin Clark, of Scotland Neck, calling attention to the case of Parker vs. Parker, 210 N. C., 264.

While the holding in this case would possibly have prevented a number of divorces which have gone through the courts if applied in those cases, nevertheless, it does not in any way affect the validity of divorces theretofore obtained, and a validating act would not only be unnecessary but, in my opinion, it would cast an unnecessary cloud upon the validity of such divorces.

Besides this, the General Assembly has no authority, at present, under our Constitution to validate a divorce which has been obtained in the courts.

SUBJECT: CORPORATIONS, ETC. WITHIN CONTROL OF UTILITIES COMMISSION

23 January, 1937.

I have very carefully considered your letter relating to cooperative associations engaging in electrical enterprises under subchapter 4, Chapter 92a of the Consolidated Statutes, and in this connection have attempted to construe C. S. 1035, relating to corporations and businesses within control of the Utilities Commission.

I have also examined the briefs and papers accompanying your inquiry.

I have come to the conclusion that cooperative associations under Chapter 92a, and particularly Article 15, C. S., are not under the supervision or control of the Utilities Commission when engaging only in furnishing electrical service to their members.

It seems to me that a proper construction of the statute giving the Utilities Commission supervision and control over utilities is sufficient to cover only those utilities which are generally referred to as public utilities and which are under obligation to serve the public generally and whose service is not confined to a selected group of members.

SUBJECT: REAPPORTIONMENT; REPRESENTATIVES IN THE HOUSE

27 January, 1937.

In your letter of January 27th you inquire whether or not an apportionment of representation in the House of Representatives can be made at this time under Article II, Section 5, of the Constitution, inasmuch as this article and section requires such apportionment to be made at the "first session after the return of every enumeration by order of Congress" upon the basis of the preceding Federal Census. Really, this is the language of Section 4, imported into Section 5, relating to apportionment of Representatives by the last clause in Section 5.

This question arose in 1935 with regard to a bill then pending to apportion the representation under the article and section of the Constitution referred to, upon the basis of the 1930 Federal Census. At that time, the "first session" at which such apportionment was required to be made had passed. It was required to be done at the 1931 session.

An opinion was given from this office at that time, to the effect that the major purpose of the constitutional requirement was that the representation should be apportioned according to the facts of population, as disclosed by the census, and that the requirement that it should be done at the first session was for the purpose of adjusting the representation to the population at the earliest moment at which it could be done. That being true, it follows that the requirement that this important matter should be attended to at the "first session" must be regarded as directory and merely in aid of the major purpose of the Constitution.

I am of the opinion that this is the proper construction of the section of the Constitution referred to, and that the fact that several sessions of the Legislature have passed since the first session after the census was taken does not deprive this Legislature of its power and authority to make such apportionment. Of course, I am not indicating in this letter anything as to the policy of such action. I am only expressing my opinion as to the law of the matter.

SUBJECT: HIGHWAY FUND; ALLOCATION TO COVER PURPOSES OF
HAYDEN-CARTWRIGHT ACT

29 January, 1937.

You call my attention to the following provision of the budget Revenue Bill for 1937, occurring on page 249 of the printed bill.

"The allocation from the Highway Fund to the General Fund herein provided for, in so far as it may exceed the sum of one million dollars per year, shall not be made to any extent that violates the provisions of the Hayden-Cartwright Act of Congress, ratified on the 18th day of June, 1934, and that has the effect of reducing the allotment of Federal funds for construction and improvement of highways in this State."

You inquire whether or not a transfer from the Highway Fund to the General Fund of the equivalent of the sales tax on gasoline, which will amount to approximately \$2,100,000.00 in each of the next two years, will constitute such a violation of the provisions of the Hayden-Cartwright Act as to jeopardize the allocation of Federal Funds for construction and improvement of highways in this State.

I beg to call your attention to my file on this subject prepared during the 1935 session of the General Assembly.

Your question is similar to the subject dealt with at that time, and you are, no doubt, familiar with some phases of it, as you were at the time Chairman of the House Appropriations Committee. I specifically call your attention to the memorandum in the file which contains a sort of history of the case.

I may say that, at the request of the Governor, I accompanied Senator Harriss Newman to Washington and there had an interview with Mr. Boykin, the head of the Legal Division of the Highway Department, and later with Mr. Thomas H. McDonald, the Director.

At the time I was in Mr. Boykin's office, I was informed by him that he had written a letter to Governor Ehringhaus expressing it as his opinion that the allocation of one million dollars out of the Highway Fund to the General Fund, which, as a policy of the State, had been done before the enactment of the Hayden-Cartwright Act, would be a violation of its terms. This letter Mr. Boykin withheld for further advice from this Department, and finally agreed that, inasmuch as this policy of the State existed at the time the Hayden-Cartwright Act became law, it would not constitute such a diversion as to jeopardize the Federal appropriation for roads.

Dr. McDonald, in an oral interview almost immediately following, expressed the view that the diversion of even a larger amount would not violate the Hayden-Cartwright Act, provided the total appropriations received by the roads for the given period would not be reduced by such diversion. It is, therefore, apparent that the chief of the Roads Department and the chief of the Legal Division were not agreed on the subject.

Section 4 of the Appropriations Act of 1933,—Chapter 282 Public Laws 1933, page 415,—transferred one million dollars from the Highway Fund to the General Fund, declaring a State policy, based upon the claim that there was preempted to the Highway Fund revenues to which the general government was denied. Section 4 of the Appropriations Act of 1935,—Chapter 306 Public Laws 1935, page 360,—provides that there shall be allocated to the General Fund, out of the Highway Fund, an amount equal to the tax upon the sale of gasoline, which is stated there to be approximately the amount theretofore taken from the Highway Fund and appropriated to the General Fund. It is apparent from your letter that this item in 1937 will be approximately twice that which was taken from the Highway Fund for the General Fund in 1933. I think it is obvious that such amounts might be, by this process, augmented indefinitely.

While I am not expressing my opinion at all as to such a policy, it is obvious that it could not any longer be protected on the same principle and by the same reasoning that the allocation of one million dollars from the Highway Fund was made in 1933.

We have, then, to go back to the original consideration of the Hayden-Cartwright Act. While I think that under a fair construction of the Hayden-

Cartwright Act its conditions are satisfied unless there should be some diminution of the amount actually devoted to the roads beyond that which was required to be expended upon them when the Hayden-Cartwright Act went into effect, I confess that this view of the matter has not met with express approval by the Legal Division of the Federal Highway Department. Furthermore, while one million dollars may have been allocated from the Highway Fund to the General Fund in 1933, and accepted by the Federal Government as not violating the Hayden-Cartwright Act because it was the policy of the State before the latter Act became law, you readily see that such reasoning would not apply to the present proposal.

I am unable to say whether or not the saving language used in the section of the law quoted by you, and limiting the expenditure by general reference to the Hayden-Cartwright Act, would serve.

As a practical suggestion, I think this matter should, in its present shape, be referred directly to the Federal Highway Department before decisive action is taken. When the file has served its purpose, I will thank you to return the same.

SUBJECT: AMENDMENT TO UNITED STATES CONSTITUTION IN
LEGISLATURE; VOTE REQUIRED

1 February, 1937.

The Constitution of the United States, Article V, provided two methods by which it may be amended. One is by ratification of the proposed amendment by the Legislatures of three-fourths of the States. No direction is given as to the manner in which the Legislature shall proceed in making the ratification.

The Constitution of North Carolina makes no specific provision with respect to any amendment to the Federal Constitution, or the manner in which ratification shall be made when properly presented. It does, in Article XIII, provide a procedure for its own amendment in which certain restrictive requirements are placed on the vote in the Legislature respecting the calling of conventions and the submission of proposed amendments to a popular vote. These are restrictions on the ordinary rule and procedure controlling the Legislature in the enactment of laws and performance of constitutional functions other than those relating to amendment to the State Constitution, and cannot be extended beyond their immediate purpose.

I am of the opinion that an amendment to the Constitution of the United States, properly presented, may be ratified by our Legislature by a simple majority vote.

SUBJECT: VACANCIES IN COUNTY BOARDS; HOW FILLED

4 March, 1937.

You have inquired as to my opinion as to how a vacancy occurring in Wilson County Alcoholic Beverage Control Board should be filled. Chapter 493, Public Laws of 1935, under the terms of which the present board was created, contains no provision for filling vacancies occurring in the membership of the board. Under the 1937 Act, H. B. 55, section 6, the following provision is made:

"In those counties, however, in which boards of control have been appoint-

ed under the provisions of chapters four hundred eighteen and four hundred ninety-three of the Public Laws one thousand nine hundred thirty-five, respectively, the respective boards of control so appointed shall constitute the board of control of the county for the full term, and at the expiration of such term their successors shall be appointed in the manner herein provided for the appointment of members of county boards of control."

This Act becomes effective on the 22nd day of February, 1937. It is provided in section 26 that stores established under Chapter 493, Public Laws of 1935, shall, from and after ratification of the 1937 Act, be operated under the terms of this Act. Section 27 repeals Chapter 493, Public Laws of 1935, to the extent of any conflict with the 1937 Act. It is my opinion that any vacancy occurring by death or resignation in the Wilson County Board would be filled by appointment by a joint meeting of the Board of County Commissioners, the County Board of Health and the County Board of Education, in Wilson County, in accordance with the provisions of section 6 of the 1937 Act.

SUBJECT: STATE INSTITUTIONS; ISSUANCE OF BONDS FOR PERMANENT
IMPROVEMENTS; GRANTS IN AID FROM FEDERAL GOVERNMENT

11 June, 1937.

Responding to your request, presented through Mr. Charles T. Woollen, Controller of the University, for an interpretation of the 1937 Act authorizing the issuance of bonds of the State for the permanent improvement of State Institutions, House Bill 1281 amongst other things enabling certain State agencies to apply for grants in aid from the Federal Government for the construction of buildings and additions thereto, I beg to say:

Section 5, to which my particular attention is directed, provides for the custody and expenditure of the proceeds of bonds and bond anticipation notes authorized to be issued in the above connection and for their proper disbursement, and in this immediate connection the section concludes:

"Any executive head of any institution, or any director, trustee, or commissioner in any State Institution or agency of the State to which an appropriation is made under this Act who votes for or aids in spending more money for public improvements for his institution than is hereby appropriated may be removed from office by the Governor."

In my opinion, this part of the section was intended solely for the protection of the State against the misapplication of the funds and against a situation which might enlarge projects at the expense of the State to an extent not intended by the Legislature. I feel sure that it did not contemplate a limitation on the total expenditure for the project where the amount appropriated by the State might be supplemented from Federal funds or from other funds as to which the State had no obligation. To put it succinctly, the clause "spending more money for public improvements for his institution than is hereby appropriated" has exclusive reference to the money furnished by the State, and is not a limitation on the total cost of the improvements. This subject is closely related to the subject of inquiry under H. B. 1281. H. B. 1281 is an enabling act, under which certain agencies are authorized to make applications for grants in aid to be made by the Federal Government for the construction of buildings and additions thereto.

The last paragraph of Section 1 of this bill reads:

"Provided further, that no expenditures by the State shall be approved or authorized by the Director of the Budget, and the Advisory Budget Commission, which shall be in excess of the total amount provided in said act for the respective institutions therein mentioned."

House Bill 1281 refers to the Institution Bond Act of 1937, from which I have quoted above in this letter.

I think this paragraph of H. B. 1281 not only explains itself but also confirms the interpretation which I have given of the Institution Bond Act above. I call your attention to the fact that the expenditures which are limited in this paragraph are distinctly stated to be expenditures by the State, and the Act itself does not refer to Federal expenditures in this connection.

Furthermore, as this Act authorizes the expenditure of the entire appropriation made by the State upon the project, and does no more than limit the expenditure on the part of the State to such appropriation, it seems to me clear that it does not intend any reduction of such a State appropriation or any pro tanto relief of the State with respect thereto because of the grant of Federal aid. In other words, it is not the intention of the statute to make an appropriation of a stated amount which might be reduced by reason of the availability of Federal funds to pay any part of such sum. The Federal grant, if received, is to supplement the State appropriation and not to serve in whole or in part as a substitute therefor.

SUBJECT: NORTH CAROLINA REAL ESTATE LICENSE ACT; SECTION 4;
QUALIFICATIONS FOR LICENSE

8 July, 1937.

Receipt is acknowledged of your letter of July 7th having reference to the second paragraph of Section 4 of Chapter 292, Public Laws of 1937. This paragraph reads as follows:

"A co-partnership or corporation shall obtain its license under this Act only by the qualification of, and issuance of license to, its members and officers who are actively engaged in the real estate business of said co-partnership or corporation, without the payment of additional fee by said co-partnership or corporation."

You state that some difference of opinion has arisen as to the exact meaning of this above quoted part of that section.

Active members of a partnership and officers of a corporation are required to secure a license under this Act, and the corporation and the partnership are not required to secure a license. Members of the partnership who are inactive and who do not participate in carrying on the business of the partnership are not required to secure the license. Officers of a corporation who do not actively engage in carrying on the business of the corporation of the character licensed, are not required to be licensed. In other words, as to partnerships and corporations it is required that a license be secured by those members of the partnership and officers of the corporation who actively participate in the real estate business conducted in the name of the partnership or corporation.

SUBJECT: MOTOR ADVERTISERS; SECTION 151½ 1937 REVENUE ACT

11 August, 1937.

Your letter of August 4, addressed to the State Department of Revenue, relative to the above subject, has been referred to this office for reply.

Section 151½ of the 1937 Revenue Act levies a tax on persons, firms, or corporations, operating motor vehicles over the streets or highways of the State which are equipped with radio, phonograph, or other similar mechanism which produces music, or has a loud speaker attachment or other sound magnifying device which produces sound effects for advertising purposes.

We do not think that this section has any application to a minister who wishes to use a loud speaker on his automobile for the purpose of preaching around local shops or on the streets and highways or other public places in the State.

SUBJECT: MUNICIPALITIES; CONTRACTS WITH PUBLIC UTILITIES; LENGTH OF TERM OF CONTRACT, AND SUPERVISION BY UTILITIES COMMISSION

20 November, 1937.

You inquire for a group of municipal officials, representing several municipalities, and wish to be informed on the following questions:

(1) Has a municipality the legal right to enter into a contract for a period of ten years or for any period longer than the term of office of its governing board?

In my opinion, a ten year contract for street lighting service is a "continuing contract" within the meaning of the statute quoted in your letter, to-wit: Paragraph (d), subsection 1, of section 2960 of the Consolidated Statutes, a part of which contract is to be performed in the ensuing fiscal year and the statute contemplates the payment of the proportional parts of such contract in each fiscal year as it comes.

In my opinion, it would be competent for the board of commissioners or aldermen, or governing body of the town, to enter into a contract for a reasonable term of years extending beyond the terms of the members of the governing body for street lighting or other service necessary to the town, where the advantages of lower rates, continued and reliable service may be essential factors for consideration in making the contract, and particularly where the expenses involving adequate preparation for such service are substantial and necessary to the certain, prompt and efficient discharge of the obligations of the contract on the part of the utility. The considerations which make such a contract reasonable must be considered as mutual and it would be difficult in many instances to secure both a low rate and efficient service without some degree of amortization allowed to the utility which is a party to the contract.

As bearing upon the power of a public board or body to make contracts extending beyond the term of office of its members, you might consider, and I think distinguish, that line of cases of which *Glenn v. Commissioners*, 139 N. C., 412, is typical.

In those cases, it may be observed that there was an attempt to contract with a private party in such a way as to restrict or bind a subsequent body with respect to the discharge of a governmental function or, at any rate, of a discretion as to a duty which the body itself owed to the public:

While it has been considered that the furnishing of lights, water, etc. is a necessary expense for a town, such an enterprise has not gotten so far away from a proprietary aspect that the town is prevented from making a reasonable contract with respect thereto through its commissioners for a term exceeding that of the terms of office of the several members of the contracting body.

The specific point is discussed in *McQuillin's Municipal Corporations*, 2nd Ed., Sec. 1355, et seq., and the conclusion above expressed is supported there by text and citation. *McQuillin*, Sec. 1355 et seq.; *Barre v. Perry*, 82 Vt., 301, 73 Atl. 574; *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, 43 L. ed., 341; *Townsend Gas & Electric Co. v. Port Townsend*, 19 Wash., 407, 53 Pac., 551; *San Francisco Gas Light Co. v. Dunn*, 62 Cal., 580; *Riehl v. San Jose*, 101 Cal., 442, 35 Pac., 358.

Various lengths of term have been held reasonable, as, for example, a ten year term in *Denver v. Hubbard*, 17 Colo. App., 346, 365, 368, 68 Pac., 993; *Reid v. Trowbridge*, 78 Miss., 542, 29 So., 167.

Of course, this opinion is given with the reservation that provision may be made in the charter of any municipality modifying the general law and controlling the right to make such contracts and the extent of the powers which may be exercised by the municipality.

(2) In my opinion, no contract between a utility company and a municipality, whereby the former furnishes lights to the latter, can oust the jurisdiction of the Utilities Commission with respect to supervision of the rates. In this respect, the contracting parties would be in no better position, by reason of the public or governmental nature of the municipality, than they would be had the contract been made with a private person. C. S. 1035 (3).

SUBJECT: TAXATION; BANK DEPOSIT TAX; FEDERAL INSTRUMENTALITY

9 December, 1937.

Your letter of December 7, addressed to Mr. Maxwell, has been referred to this office for reply.

Without going into the matter in detail, other than to state that your organization, being a Federal instrumentality, is exempt from the bank deposit tax, provided by section 701, 1937 Revenue Act, and we have so advised the Commissioner of Revenue.

SUBJECT: SCHOOL LAW; DISPOSITION OF LOCAL SUPPLEMENT

21 April, 1938.

Replying categorically to the questions listed in your letter of April 21, we state, first, that the tax levied for the local school supplement must be made by the Board of County Commissioners. Second, the County Tax Collector has the duty of collecting these taxes, which are turned over to the County Treasurer, who is also Treasurer for the School Administrative Unit. The funds derived from the local supplement are to be disbursed under the authority of the Local School Board, but cannot be used for any purpose other than for schools.

SUBJECT: NATURALIZATION LAWS

28 May, 1938.

You inquire if the minor child of a father who has become naturalized during the minority of such child automatically becomes a citizen of the United States. Section 50 of the Naturalization Laws, as compiled and set forth in Appendix V of Michie's Code, 1935, is in part as follows:

"The children of persons who have been duly Naturalized under any law of the United States, or who previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof"

From the above it will be seen that if in fact the doctor to whom you refer was living in this country and was under the age of twenty-one years at the time his father became naturalized as a citizen of the United States, that such doctor automatically at that time became himself a citizen of the United States.

MISCELLANEOUS OPINIONS

digested by

THE INSTITUTE OF GOVERNMENT

and published in the magazine

POPULAR GOVERNMENT

AD VALOREM TAXES. EXEMPTIONS; RELIGIOUS AND EDUCATIONAL ORGANIZATIONS

A clubhouse owned and used by a woman's club would be exempt from ad valorem taxation under the 1937 Machinery Act.

Inquiry: Is Property owned by a foreign educational corporation, the income from which is used exclusively for educational purposes in North Carolina, exempt from taxation?

Yes. Where the income is expended for educational purposes within this State, the property should be tax exempt under the 1937 Machinery Act. But if no income at all were derived from the property, then it would be subject to taxation, inasmuch as the exemption applies only when income is received and is expended within the State for a religious, charitable, educational or benevolent purpose.

REVALUATIONS

In our opinion, section 301 of the 1937 Machinery Act contains provisions whereby timber land, from which the timber has been removed since the last revaluation year, may be reassessed. Subsection (3) of section 301 states the conditions under which real property may be revalued and clause (c) authorizes such revaluation where the property has been decreased in value, to the extent of \$100.00 by the destruction, damage or removal of appertinances from it.

In our opinion, this provision is sufficiently general in its terms to justify reassessment of real property from which the timber has been removed since the last valuation.

CREDIT TO HOSPITALS FOR CHARITY WORK

Inquiry: a doctor owns all of the capital stock of an incorporated hospital. This doctor in his own name owns real estate on which the hospital is located and which he permits the hospital to use. May claims for charity work under section 602 (2) of the Machinery Act be used to offset taxes assessed against the real estate?

No. The offset could not properly be allowed because the real estate is neither owned, listed nor assessed in the name of the hospital institution.

TAX COLLECTION; CORRECTIONS AND DISCOVERIES

This office is of the opinion that C. S. 7971 (50), subsection (4), would not permit the listing of property, which has escaped taxation, for a longer period than five years prior to the discovery of the property.

TAX COLLECTIONS; ACCEPTANCE OF BONDS OR NOTES FOR TAXES

Is a municipal corporation authorized to accept past due bonds owned by it in payment of city assessment?

A municipal corporation does not have this authority in the absence of a special law conferring such authority.

TAX COLLECTION; GARNISHMENT

In our opinion rents due a taxpayer would constitute a debt subject to garnishment for delinquent taxes under C. S. 8004.

GENERAL POWERS TO LEVY

What limitations are placed on counties in the matter of licensing businesses as trades or professions?

Counties are not given general authorization to levy privilege taxes on businesses, trades, or professions in the same manner as municipalities are under C. S. 2677. This is to advise, therefore, that if the Revenue Act does not authorize the county to levy a license tax for the privilege of engaging in occupations therein outlined, the county would be without authority to levy a license or privilege tax.

POLL TAXES AND DOG TAXES. EXEMPTED CLASSES

Inquiry: Is a prisoner working on the roads exempted from poll tax?

There is nothing in the Constitution or the statutes exempting or authorizing a county or city governing board to exempt from poll tax on the basis of imprisonment. It might be, of course, that such prisoner could be exempted under the powers to exempt on account of poverty or infirmity.

MEMBERS, COUNTY AND CITY BOARDS; VACANCIES

A vacancy on the County Board of Education should be filled by action of the County Executive Committee of the political party of the member causing the vacancy—such appointment to be effective until the next regular session of the General Assembly, and then for the residue of the unexpired term by that body.

When a school committeeman moves out of the school district for permanent residence it creates a vacancy and it would be competent to appoint someone in his stead.

COVERAGE BY FIRE INSURANCE

Inquiry: May State School Boards and public bodies having the duty of insuring school property do so in a mutual company, where policies are made non-assessable?

This question was decided in the affirmative by the case of *Fuller v. Lockhart*, 209 N. C., 61.

MISCELLANEOUS MATTERS AFFECTING COUNTIES. A. B. C. BOARDS AND STORES

C. S. 4388, would prohibit a member of an A. B. C. Board representing a wholesale house from selling paper bags for use in the A. B. C. store.

Inquiry: May a county A. B. C. Board transfer liquor seized by its law enforcement officers to local hospitals?

I am of the opinion that a county A. B. C. Board would be without such power. It is probably based upon a worthwhile motive; however, we can find no legal justification therefor. The statute expressly provides that confiscated liquors shall be destroyed.

SUPPORT OF THE POOR. OLD AGE ASSISTANCE

We are of the opinion that under the State law one witness is all that is necessary to witness the endorsement by mark of checks payable to old age pensioners.

Inquiry: When a pensioner under the old age assistance act dies prior to his endorsement of his assistance check, what is the proper procedure?

This situation is not covered by any provisions in the Old Age Assistance Act. In our opinion it would be proper for the Clerk of Court to endorse the check and pay the proceeds to the proper person. Inasmuch as recipients of such aid are usually poor, their assets are unlikely to exceed \$300, in which case no administration of their estate would be necessary.

Inquiry: Does the County Board of Public Welfare have authority to employ the personnel it needs in the local administration of Old Age Assistance and Aid to Dependent Children?

In our opinion under chapter 288 of the 1937 Public Laws, sections 13 (c) and 43 (c) are in themselves sufficient authorization to the County Welfare Board—acting, of course, in accord with the standard set up by the State Board of Public Welfare.

A person convicted of a felony, if otherwise entitled, is not deprived of his right to Old Age Assistance because of loss of "citizenship" in the sense of his inability to vote or hold office.

COSTS PAYABLE BY THE COUNTIES. COURT COSTS; STATUTE OF LIMITATIONS

Court costs are a part of any judgment rendered by a court of competent jurisdiction and when the statute of limitations runs against a judgment, it, of course, would run against the costs attached thereto. The statute of limitations prescribed for civil judgment is 10 years beginning as of the date of docketing.

EXTENSION OF FILING TIME IN CIVIL SUITS

Inquiry: Does the Clerk of Superior Court have the right to extend the time for the filing of an answer in a case in which a copy of the complaint is served with the summons?

Under C. S. 509 as amended by c. 66 of the 1927 public laws, you may extend the time for filing an answer or demurrer, but not more than one time nor for a period of time exceeding 20 days, except by consent of the parties. It is my opinion that the effect of the 1927 amendment is to authorize the Clerk of Superior Courts to grant this extension.

VACANCIES

A Register of Deeds appointed to fill a vacancy, in a county where the General Assembly has increased the term to four years, would, under C. S. 3546, serve the entire remainder of the four year term.

LOCAL LAW ENFORCEMENT OFFICERS; PROHIBITION LAW; POSSESSION FOR SALE

Inquiry: C. S. 3379 makes possession of more than one gallon of intoxicating liquors prima facie evidence of possession for sale. Is this statute applicable in case of liquors purchased at an A. B. C. Store?

Yes. We are of the opinion that, under *State v. Langly*, 209 N. C. 178—although this case construed the 1935 liquor control law—C. S. 3379 is still in force.

AUTOMOBILE DRIVERS' LICENSE ACT

Inquiry: Must a chauffeur carry with him at all times while operating a vehicle both his chauffeur's license card and chauffeur's badge?

Yes. Section 2 (e) of chapter 52, 1935 Public Laws specifically requires that he carry both the license card and the badge.

PUBLIC DRUNKENNESS

Inquiry: Is there any state-wide law relative to public drunkenness?

Chapter 49, 1937 Public Laws, makes it a misdemeanor, punishable by a maximum fine of \$50 or a maximum term of imprisonment of thirty days, for any person to become intoxicated, or to make any public display of any intoxicating beverage at any public place in North Carolina.

COUNTY BOARD OF HEALTH; POWERS

C. S. 7194 provides in effect that all persons who shall be confined or imprisoned shall be examined for, and, if infected, treated for venereal diseases by the health authorities or their deputies. This is to advise, therefore, that you would have the authority to treat, with or without his consent an infected boy who has been committed to the Morrison Training School.

MUNICIPAL OFFICERS; FIREMEN

Inquiry: May persons in a volunteer fire department use sirens on privately owned vehicles while attending a fire?

Under chapter 407, section 88, subsection (b), Public Laws of 1937, I think that members of a volunteer fire department would have such a right. Of course, it would be improper for them to use these sirens at any time other than while attending a fire.

DOUBLE OFFICE HOLDING

The following position was held not to be a public office within the meaning of the constitutional provision prohibiting double office holding:

Chairman, County Democratic Executive Committee.

The following positions were held to be public offices within the meaning of the constitutional provision prohibiting double office holding:

City Treasurer.

Clerk of Recorder's Court.

County Tax Collector.

Deputy Register of Deeds.

District School Committeeman.
Mail carrier,—substitute rural.
Mayor.
Notary Public.
Town Alderman.
County Commissioner.

PRIMARIES; QUALIFICATIONS AND RIGHTS OF VOTERS; RESIDENCE

C. S. 5937 would permit you, while in governmental service, as an employee of the Bureau of Internal Revenue, to retain your residence at the place you last resided at the time of your removal to enter the government service, and would permit you to vote there unless you exercise your right to vote at such new location after your removal.

GENERAL AND SPECIAL ELECTIONS; ABSENTEE BALLOTS

Under C. S. 2962-a, permitting an absent voter to secure ballots by giving a written order to the Chairman of the Board of Elections or to the registrar of his precinct, it is our opinion that such order should be signed personally by the individual voter himself.

We see no reason why a form of application could not be prepared and signed personally by a number of individual voters, all of whom are voters in a particular county or precinct.

AD VALOREM TAXES. EXEMPTIONS; RELIGIOUS AND EDUCATIONAL ORGANIZATIONS

Please advise if the following property in our town is subject to ad valorem taxation by the town: (1) Property owned and rented by the American Legion which has been taken in by foreclosure of mortgages for unpaid loans; (2) property acquired and used similarly by Meredith College; (3) property owned and rented by the County which has been taken in by tax sales and foreclosure of tax certificates in some cases and foreclosure of mortgages in others.

(1) Subsection (6), Section 304, 1935 Machinery Act, is not broad enough to include property of the American Legion which is not used exclusively for lodge purposes or is adjacent thereto. (2) Chapter 204, Public Laws of 1933, section 4(a), changed the law in regard to the exemption of church property, and it is not necessary any longer for such property to be adjacent to a church to be exempt from taxation. (3) Property acquired by the County in a tax foreclosure suit is subject to municipal taxation on the theory that it is not used for governmental purposes. See *Benson v. Johnston County*, 209 N. C., 751.

EXEMPTIONS; CITY AND COUNTY PROPERTY

Inquiry: Are the stocks of County A. B. C. stores subject to ad valorem taxation by a town?

In view of certain decisions of the Supreme Court involving the question of taxes upon the property of municipalities (Board of Financial Control

v. Henderson County, 208 N. C., 569, and Benson v. Johnston County, 209 N. C., 751), it is probable that the Supreme Court, if a case should come before it involving the taxation of stock and property of A. B. C. stores, would say that they are subject to tax.

As in all other cases where a departure seems to be made from settled doctrines by decision of the Supreme Court, the matter is still in some doubt as to the extent to which the decisions may be applied. In cases which may be considered "in the twilight zone," I can only make a guess. However, although it may be contended, and properly in some respects, that an A. B. C. Board is a municipal corporation having some governmental functions with respect to the control of the traffic in liquor, in my judgment the actual sale of intoxicating liquors can not be considered a governmental function or purpose, and the property used for such sale, that is, the stock of liquors, not protected from taxes on the theory that it is property of a municipality used for such governmental functions. In other words, I am of the opinion that such property is subject to county and municipal tax by the uniform and ad valorem rule.

EXEMPTIONS; FEDERAL LAND BANKS

Inquiry: Are first mortgages executed to Federal Land Banks or Joint Stock Land Banks liable to ad valorem taxation (1) when held by the bank to which they were executed and (2) if purchased and owned privately?

No. In both cases, such mortgages are declared by the federal law under which these agencies are created to be instrumentalities of the United States government, and they retain their character notwithstanding that they are purchased and held privately. They are, therefore, not subject to ad valorem taxes by a governmental unit, nor is the income derived from them subject to taxation.

TAX FORECLOSURE; COSTS AND FEES

Where Sheriff's fees have been collected in tax foreclosure cases where the return was "dead" or "not to be found," I am of the opinion that such fees should be turned over to the Sheriff.

Inquiry: I notice you have ruled that Chapter 560, Public Laws of 1933, applies to actions to foreclose tax sales certificates under C. S. 8037. What fees apply in tax suits under C. S. 7990?

Tax suits brought under C. S. 7990 are not subject to the provisions of this act, and the fees allowed the Clerk are the same as in other actions. The fee bill varies so much in different counties, we would not venture to say what the fees are in your County, but you can easily ascertain them by reference to the Consolidated Statutes.

TAX COLLECTION; NECESSITY OF EXHAUSTING PERSONAL PROPERTY

Inquiry: Is a municipality under legal obligation to levy on personal property before proceeding against real property for the collection of taxes due on the latter? If so, can a person holding a deed of trust against such

real property avoid payment of the taxes on the ground of the municipality's failure to first levy on personal property?

Under C. S. 8006, the proper procedure for a municipality is to have the Collector to levy first on the personal property of the taxpayer before proceeding to collect the real property tax out of the real property. This law mandatory.

However, if the City should have the Collector to proceed first against the real property of the taxpayer, the lien holder or the transferee of the trustee in the deed of trust could not avoid payment of the taxes on these grounds. In such a case, if the lien holder had pointed out to the Collector personalty out of which the taxes could have been collected, the Collector would be liable to the taxpayer, *Geer v. Brown*, 126 N. C., 238. But under C. S. 8011, "where actual sales of real estate are made for taxes under the general laws of the State, the taxpayer whose real estate has been sold for taxes shall be precluded thereafter from attacking such sale on the ground that the tax could have been procured from personal property," and the purchaser takes good title, although the personalty was not first exhausted. See *Stanley v. Board*, 118 N. C., 75.

TAX COLLECTION; DATE LIEN OF TAXES ATTACHES

Inquiry: How long prior to April 1 must a person reside in a county before he is liable to list personal property for taxes?

A person residing in your county on April 1, even though he moved there on that day, would be required to list his property for ad valorem taxes.

Inquiry: An owner failed to list a certain piece of realty on April 1 and sold it on April 15. The omission was discovered and the tract added to his abstract. When does the lien of taxes attach, and who is liable for the taxes?

Section 507(1) of the Machinery Act requires every person owning property on April 1 to list it for taxes, and Section 521(1) empowers the County Chairman and Tax Supervisor to enter any unlisted property on the tax roll in the name of the owner or occupant as of April 1.

The owner having failed to list the property as required by law, it was properly listed by the county officials in the name of the owner as of April 1, and in our opinion, the county is fully protected in proceeding to advertise and sell the land for the taxes, which are delinquent.

In case of foreclosure of the lien, the subsequent owner and any lienors should, of course, be made parties to the suit under the decision in the case of *Mayo v. Beaufort County*, 207 N. C., 211.

TAX FORECLOSURE; PROCEDURE UNDER C. S. 7990

Inquiry: May tax foreclosure suits be brought under C. S. 7990 rather than C. S. 8037 for (a) county; (b) city, and (c) county drainage district? Would any Statute of Limitations apply as to actions by a drainage district?

Assessments for drainage districts are permitted to be collected as taxes, and our Court has directly held in *Longstreet Drainage District v. Huffstetler*, 173 N. C. 523, that it is proper to bring a foreclosure suit to collect delinquent taxes under C. S. 7990.

Notwithstanding the enactment of C. S. 8037, the Court has since held in *Wilkes County v. Forrester*, 204 N. C., 163, that C. S. 7990 is still available for the collection of taxes for counties and municipalities, and it must be, therefore, still available for drainage districts.

In the *Huffstetler* case (1917) you will note that the Court held that the 10-year Statute of Limitations would apply. However, C. S. 5312 was amended by Chapter 7, Public Laws of 1921, and the drainage districts were declared to be political subdivisions of the State.

If the statute could make a drainage district a political subdivision of the State, obviously the Statute of Limitations would not apply. There is some doubt in my mind, however, whether a statute, by mere terminology, could convey to a drainage district the essential characteristics of a political subdivision of the State, amongst which the most important is the exercise of some sort of governmental function. Very probably, however, the Court would sustain it.

FOR HIRE CARS AND TRANSFER TRUCKS

Inquiry: May a town levy Schedule "B" license tax on taxicabs under C. S. 2787(36) in addition to the \$1 tax allowed on all motor vehicles resident in the town?

C. S. 2787(36), even though it provides that municipalities may license and regulate persons engaged in the taxicab business, is superseded by Section 61, Chapter 407, Public Laws of 1937, which specifically prohibits municipalities from levying "any license or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina" except that municipalities may levy not more than \$1 per year upon any such vehicle. Section 61(b) further employs the prohibition against the levy of "additional franchise tax, license tax or other fee" by counties, cities, and towns.

PUBLIC SCHOOLS. ERECTION OF SCHOOL BUILDINGS

Inquiry: May a county contract debts or borrow money from the State Literary or Building fund, without a vote of the people, for constructing or repairing school buildings?

Under a recent Amendment to the Constitution, it would be necessary to submit the proposition to the voters if the proposed loan would exceed two-thirds of the amount by which the county's indebtedness was reduced during the preceding fiscal year.

Under the recent decisions of the Supreme Court in *Frazier v. Commissioners*, 194 N. C., 49, and *Hemrick v. Yadkin County*, 206 N. C., 845, such a vote might be necessary even though the proposed loan would come within the limitation mentioned above.

My personal opinion is that it would not be necessary to submit it to a vote if the loan would come within this limitation. However, it is a doubtful

question—one on which good bond attorneys differ—and I can not predict what the Court would hold.

Inquiry: If the bids for proposed school additions are outside the budget amounts approved and set up therefor, may the County Board of Education do the building itself, employing a Superintendent and the necessary help on a wage basis?

In our opinion, C. S. 1316(a) only provides that when construction costing over \$1,000 is let at contract, it shall be by advertisement and submission of bids, and that the Board of Education may still construct the building on its own. However, care should be taken to see that the person supervising the construction should not, in fact, be made a contractor.

APPORTIONMENT OF FUNDS

Inquiry: (1) Out of a 7c county-wide ad valorem tax for maintenance of school buildings, what part should go to a city unit with 20% of the total school enrollment of the county? (2) What is the basis of distribution of fines, forfeitures, poll taxes and dog taxes between the county and city school units? (3) How are capital outlay funds apportioned between city and county units?

(1) the 7c tax levied for maintenance of school buildings is for current expenses of the schools in the county and should be apportioned on a per capita enrollment basis as provided in Section 15(c) of the School Machinery Act of 1937. (2) Fines, forfeitures, poll taxes and dog taxes are county-wide funds and should also be apportioned on an enrollment basis. However, there is a provision in the School Machinery Act (Section 9) providing: "The objects of expenditure designated as Maintenance of Plant and Fixed Charges shall be supplied from funds required by law to be placed to the credit of the public school fund of the county and derived from fines, forfeitures, penalties, dog and poll taxes, and from all other sources except State funds: Provided, that when necessity shall be shown, the State School Commission may approve the use of such funds in any administrative unit to supplement any object or item of the current expense budget; and in such cases, the tax levying authorities of the county administrative unit shall make a sufficient tax levy to provide the necessary funds for maintenance of plant, fixed charges and capital outlay."

(3) Section 15(c) of the 1937 School Machinery Act also provides that "all county-wide capital outlay school funds shall be apportioned to county and city administrative units on the basis of budgets submitted by such units to the county commissioners and for the amounts and purposes approved by said commissioners; said capital outlay funds to be disbursed in the same manner as provided for school funds."

ATTENDANCE DISTRICTS

Inquiry: May a County Board of Education require school principals not to allow elementary school children living in one school district to be enrolled in the schools of another district?

C. S. 5661 is intended to give resident children all the benefits of the schools of the district. C. S. 5662 provides that under certain circumstances

it is permissible for non-resident children to attend the schools of the district upon the payment of tuition fees. C. S. 5481 provides that if school facilities for all the children in a given district are not adequate, the County Board of Education may authorize the transfer of these children to another district, and this seems, in a measure, to limit the action of the County Board in the premises to the instances where school facilities in a particular district are not adequate. C. S. 5430 and 5461, giving to the County Boards of Education general supervision and control of all matters pertaining to public schools, does not, in my opinion, give the County Board a discretion as to who may, or may not, attend these schools. This question is closely related to larger questions, such as bus routings and the number of teachers allocated to a particular school, in which instances cooperation between County Boards of Education and the State School Commission is essential. However, if no other provision has been made for attendance of non-resident children in the public schools of a district, the Board of Education might require of the principal that he confine the enrollment to resident children.

POLL TAXES, DOG TAXES, FINES AND FORFEITURES ACCRUING TO SCHOOLS; OBJECTS FOR WHICH SUCH FUNDS MAY BE SPENT

Inquiry: The county board of education has received a bill from the county commissioners for \$40 for certain hogs killed by dogs of undetermined ownership. Should this bill be paid?

In my opinion, under C. S. 1681 this bill should be paid out of the money collected from license taxes on dogs. If this money had been paid over to the county board of education, that board should pay the bill. If the money is still held by the board of county commissioners, it should pay for the hogs and turn the balance of the taxes over to the board of education.

SCHOOL HEALTH LAWS; HEALTH CERTIFICATE

C. S. 5566 requires that teachers must receive a health certificate from the county physician or other reputable physician of the county certifying that they have not an open or active infectious state of tuberculosis or any other contagious disease. The school board is not authorized to modify or restrict the application of the law or limit the source of the certificate to the city health department.

COMPULSORY VACCINATION

Inquiry: Is smallpox vaccination compulsory for all children attending the public schools?

C. S. 7162 states in part that "The board of health of any town, city or county shall have authority to require children at the public schools to present a certificate of immunity from smallpox either through recent vaccination or previous attack of the disease." See also *Hutchins v. School Committee*, 137 N. C. 68, holding that where a school board has entire and exclusive control of the public schools, it may require vaccination as a prerequisite to attendance.

AD VALOREM TAXES; EXEMPTIONS; RELIGIOUS AND EDUCATIONAL
ORGANIZATIONS

In our opinion, an individual who makes a loan to a church committee for erecting a church is liable to taxation upon such solvent credit. The fact that a church is not taxable does not alter the case.

The fact that a parcel of land is held by a Catholic Bishop or other minister does not render it exempt from taxation. In order to be exempt, the property must actually belong to the church and the income therefrom be used for church purposes.

MISCELLANEOUS MATTERS AFFECTING COUNTIES; CONTRACTUAL
POWERS; COMPETITIVE BIDS

Inquiry: Our board of county commissioners considers that an emergency exists at one of the schools, so acute is the need for additional rooms. Is there any prohibition against the county's engaging a competent contractor and constructing the addition without the formality of advertising and letting the contract to the low bidder?

Chapter 400 as amended by Chapter 552, Public Laws of 1933, requires advertising and public letting in the case of construction of which the estimated cost exceeds \$5,000. However, if the total does not exceed this figure, it is our opinion that there would be no prohibition against the commissioners' going ahead and engaging a competent contractor and accomplishing the construction of the building described by you.

SUPPORT OF THE POOR; OLD AGE ASSISTANCE

Inquiry: May a county voluntarily contribute funds for old age assistance and aid to dependent children in addition to the amounts which it is required to contribute under Chapter 288, Public Laws of 1937? A few of the counties which have reached their quota and exhausted the amount of funds allocated by the State would be willing to put up 50% of an amount for an additional quota to be matched by federal funds.

There is nothing in the 1937 Act which would prevent the various counties from contributing from available funds additional amounts to care for the needy aged and dependent children within their jurisdiction. And if such funds are contributed for this purpose, I am informed that the Federal Government will match the payments for old age assistance and pay the proportion provided by the Federal Social Security Act as to dependent children. We would suggest, however, that you secure confirmation as to the federal grants from the Federal Social Security Board. It is also understood, of course, that any such funds would be administered in accordance with the provisions of Chapter 288, Public Laws of 1937.

OLD AGE ASSISTANCE

If the Board is satisfied that the person was married to a citizen of the United States, this would make her a citizen of this country and eligible for old age assistance.

SUPPORT OF THE POOR; LEVIES FOR DEPENDENT CHILDREN

Inquiry: Is an adoptive parent eligible for aid to dependent children in behalf of a legally adopted child?

Yes. Under the North Carolina law, the adoptive parent has precisely the same relation to the child as its natural parent.

POOR RELIEF

Inquiry: What is the responsibility of the county superintendent of public welfare in respect to the care and support of the poor and the administration of the "poor fund" of the county?

Considering the several statutes on the subject together, it seems clear that it was the intention of the General Assembly that the administration of the poor relief funds of the counties shall be committed to the county superintendent, under the control of the board of county commissioners, as provided by C. S. 5017.

This does not mean that the commissioners do not remain the responsible board for the administration of general poor relief, but it should be done by them through the county superintendent as the agency set up by the county for that purpose. See also and compare Chapters 319 and 288, Public Laws of 1937, and C. S. 1335.

CONTRACTUAL POWERS; LIGHT AND POWER CONTRACTS

Inquiry: Has a municipality a legal right to enter a street lighting contract with a public utility for 10 years or any period longer than the term of its governing board?

In our opinion, this is a "continuing contract" within the meaning of C. S. 2960(d) (i), and it would be competent for the governing board of a town to enter such a contract for a reasonable period, extending beyond their terms, where the advantages of lower rates and reliable and continued service may be essential factors in making the contract.

No contract between a utility and a municipality, by which the former furnishes light to the latter, can oust the jurisdiction of the Utilities Commission in respect to the supervision of the rates. In this regard, the contracting parties would be in no better position, by reason of the public or governmental nature of the municipality, than they would be had the contract been made with a private person. C. S. 1035 (3).

COUNTY COMMISSIONERS; TRADING WITH MEMBER OF BOARD

Inquiry: Is it a violation of C. S. 4388, relating to a member of the commissioners trading with the board, for a county commissioner to sell an insurance policy to the county board of education?

We think not. For a violation of C. S. 4388, it is, in my judgment, essential for the party to be interested directly or indirectly in a contract made with the board of county commissioners or under its authority, and this element is wanting where the contract is made with the county board of education.

In this instance, all the county commissioners have to do with the board of education and its various contracts and expenditures is to approve the budget. When the needs of the board of education are set out, the board of county commissioners has nothing to do, as I see it, with the approval or disapproval of any contract in which these needs are supplied.

COSTS

Inquiry: Should jail fees be taxed in criminal bills of costs or are they only a civil liability?

In our judgment, the expense of the upkeep of prisoners is not regarded by the law, as found in C. S. 1347, as costs in the ordinary sense of the word. A prisoner, as you know, may be confined in jail until the costs are paid or until he is entitled to discharge by taking the insolvent debtor's oath.

Obviously it would be absurd to continue to keep and feed a prisoner, accumulating additional expenses, in order to enforce the payment of jail fees. Perhaps this common sense view of the matter was in the minds of the lawmakers when they made the provision in C. S. 1347, making reasonable charges for jail fees a charge against the prisoner. The statute simply makes the prison fees a preferred debt of the prisoner, and when he has no estate, the county must pay it. For this reason, we think that such jail fees should not be included in the bill of costs as such.

Inquiry: What is the duty of the Clerk of Court in cases instituted or appealed to the Superior or General County Courts, when the parties make an adjustment between themselves and have judgment signed in accordance with the agreement, either dismissing the action or requiring the performance of certain conditions, and a clause is placed in the judgment directing that no cost shall be taxed by the Clerk?

It is impossible for any agreement between the parties to a civil action to have the effect of repealing the law relating to costs. A judgment following a compromise derives its force from the judgment of the parties, sanctioned by the Court; C. S. 1225 et seq. and *Cason v. Shute*, 211 N. C. 195. Therefore, in my judgment, it is impossible for a compromise judgment to be so drawn as to deprive the officers of the court of their costs, or to destroy the power and authority given by the statute for taxing the same.

We also do not think that this power resides in the Judge of a Superior Court, even in a case which is not disposed of by compromise, inasmuch as the statute plainly provides that the costs shall be taxed against the losing party.

PROHIBITION LAW; 1937 LIQUOR CONTROL ACT

Inquiry: What quantity of legal whiskey may a person have in his home?

In our opinion, notwithstanding House Bill 55, C. S. 3379 is still in full force and effect in all the counties of this State. Under this section, as con-

strued by *State v. Langley*, 209 N. C., 178, possession of more than one gallon of intoxicating liquors by anyone in his home or elsewhere is prima facie evidence of an unlawful intention to sell the liquor. Hence, a person charged with the possession of nine pints of legal whiskey can be tried under C. S. 3379 for possession of the liquor with the unlawful intention to sell, irrespective of whether or not the taxes required by section 13 of House Bill 55 had been paid. In those counties which are under the Liquor Law of 1937, a person may lawfully have in his possession more than one gallon of liquor, only if he does not have the unlawful intention to sell it.

Inquiry: May a sheriff lawfully confiscate whiskey of a gallon or less found in a person's possession with a government stamp thereon but without a State stamp?

Under the 1937 Liquor Control Act, section 22, if a county has voted for liquor, a person may have as much as one gallon in his possession for his own use, irrespective of whether it has any stamp on it. If a county is under the Pasquotank or New Hanover Acts, C. S. 3379 would still be applicable and would make possession of more than one gallon prima facie evidence of an unlawful intention to sell the liquor.

Inquiry: Is it unlawful under the 1937 A. B. C. Act to possess in a dry county for the purpose of sale alcoholic beverages legally purchased at a county A. B. C. Store?

In *State v. Langley*, 209 N. C. 178, it was held that the Pasquotank Act does not affect the provisions of C. S. 3379, making possession of more than one gallon of liquor prima facie evidence of an unlawful intention to sell. This case came from Nash County, which at the time had A. B. C. Stores under the Pasquotank Act. C. S. 3379, as pointed out by the Court in this case, is not a part of the Turlington Act. The same situation exists since the enactment of the 1937 law, and, in our opinion, there is no express or implied repeal of the above section.

AUTOMOBILE DRIVERS' LICENSE ACT

Inquiry: Do State Highway Patrolmen have authority to take up and forward to the Department of Revenue the licenses of operators arrested for violations of the Uniform Drivers' License Law?

We do not think so. The power to suspend or revoke an operator's license is given to the central department in Raleigh, but not to the members of the Patrol.

Inquiry: I wish to inquire regarding the right of a person whose driver's license has been revoked or suspended by the Department of Revenue to appeal to the Superior Court?

Section 11 provides that such person may request a hearing before the Department for review of its action in suspending his license. Section 19 provides that an appeal lies from the revocation or suspension to the Superior Court, but not if the offense was one for which revocation is made mandatory by section 12.

JURISDICTION

A Justice of the Peace, or a Mayor acting as a Justice of the Peace, has jurisdiction in criminal matters of all offenses of whatever kind where the punishment does not exceed 30 days or \$50.

Inquiry: Do Justices of the Peace still have final jurisdiction of cases of public drunkenness?

Yes, as the punishment under Chapter 49, as amended by Chapter 411, Public Laws of 1937, is limited to not exceeding \$50 or 30 days, in the discretion of the court.

A magistrate does not have final jurisdiction in cases of careless and reckless driving on the highways, but he does have the power on indictment to bind persons over to a higher court.

GAME WARDENS; POWERS AND DUTIES

Under C. S. 2141(x), a game warden has power to arrest without a warrant a man apprehended in the act of violating the game law. The warden and deputies also have power to execute all warrants issued for violations of this act and to serve subpoenas issued for examination, investigation or trial of offenders against any of the provisions of the Game Act.

PARTICULAR RULINGS AFFECTING GAME LAWS

Inquiry: Must a person (other than persons expressly excepted from the license law) have a license to legally hunt unprotected as well as protected game?

Yes. Section 12 of the North Carolina Game Law requires that any person taking any such wild animals or birds, without regard to whether or not such wild animals or birds are protected or unprotected, shall procure a license as provided in the Act.

Inquiry: Isn't it illegal to sell fresh water bream in North Carolina although caught in South Carolina or Florida?

This is a violation of Rule 11 of the State-wide inland fishing regulations, adopted by the Department of Conservation and Development under C. S. 1878, which we feel is sufficiently broad to cover this case.

Inquiry: What are the residence requirements in a prosecution for unlawfully hunting with a resident license?

This is purely a question of fact for the court to decide whether the licensee is a bona fide resident of this State. Under the game law, a person who has not been a resident of this State can not acquire a residence for the purpose of securing a resident license until he has been in the State for at least six months. A person who at one time resided in this State but who has been living out of the State would be presumed to be a resident of the state in which he was actually living. We have recently advised the Department of Conservation and Development in such cases to require a person claiming to have retained his residence here to make an affidavit to this effect, including a statement as to the last place he voted.

ABSENTEE VOTING

Inquiry: Can absentee ballots be cast in primaries for city elections?

In the absence of special local act, absentee voting in city primary elections is proper under the decision of the court in *Phillips v. Slaughter*, 209 N. C. 543.

Inquiry: Chapter 107, Private Laws of 1931, which is a part of our City Charter, prohibits absentee voting in city elections. Does this apply in the face of the decision in *Phillips v. Slaughter*, 209 N. C. 543?

This case arose under the general law and decided merely that the absentee ballot law applies to municipal elections. It does not cover a case where the charter of a city itself provides that absentee voting shall not apply to the city's primaries and elections.

MUNICIPAL ELECTIONS; RESIDENCE OF CANDIDATES

This office has ruled that a person who lives outside the corporate limits could not serve as a member of the board of commissioners of a town.

LIQUOR CONTROL ELECTIONS; PETITION

Inquiry: Must a petition for a county liquor election under the 1937 A. B. C. Act be signed by 15% of the persons who actually voted in the last election for Governor or by registered voters equal in number to 15% of those voting in the last election for Governor?

We think it must be by a number equal to 15% of those voting in the last election for Governor. We can not come to the conclusion that the law meant only those who voted for Governor may petition.

We think it is the duty of the board of elections to determine in advance of calling the election, whether the petition is signed by the required number of registered voters, and the only way this can be determined is by checking the names on the petition with the registration books of the county.

HOURS

Inquiry: When should the polls be opened and closed in a county liquor election?

The polls should be kept open from 7 A. M. to 7 P. M., provided this is not after sunset.

State of North Carolina
Department of Attorney General
Raleigh

July 1, 1938.

Hon. Harry McMullan,
Attorney General,
Raleigh, N. C.

Dear Sir:

I beg to submit herewith a report of the work of the Legislative Reference Library from July 1, 1936, to June 30, 1938.

During the foregoing period the following publications have been prepared and distributed among state and county officials and a large number of interested citizens throughout the State:

1. In February, 1937, a directory of State and County Officials containing 92 pages was compiled, published and distributed. This booklet continues to be in great demand and it is hoped its biennial publication may be continued.

2. The North Carolina Manual for 1937, containing 250 pages. Due to lack of finances, it was necessary to continue the reduced size of the Manual, which had been made necessary in 1931. However, essential material bearing on the political and governmental life of the State and of peculiar interest to our legislators and other public officials was retained.

3. In June 1937, a Court Calendar covering the biennium, July 1, 1937, to June 30, 1939, was prepared and published and distributed to court officials, practicing attorneys and others interested. This publication has long been regarded as indispensable by judges, solicitors and lawyers in keeping up with the changes in terms of court made at each session of the Legislature.

Various matters of a legislative nature have been investigated and compiled for municipalities and persons throughout the State.

During the session of the 1937 General Assembly, over 500 bills were drafted for legislators and much assistance rendered them in securing information desired on various matters of proposed legislation. This form of service is being appreciated more and more at each session of the Legislature.

Following the State Primaries held on June 4 and July 2, 1938, a list of legislative nominees was compiled and published.

After each November election a list of the newly elected members of the General Assembly is printed.

Respectfully submitted,

Henry M. London,
Legislative Reference Librarian.

TABLE ONE
Consolidated Statutes Cited or Construed in Biennial Report

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220 (b)	274	3411 (T)	175	5872	296
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225 (m)	276	3838	148	6045	250
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1881	269	5039	313	7486 (j) (oo)	320
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2621 (29b)	195	5168 (rr) - (ddd)	309	7651	117
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